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STATE CONSTITUTIONAL LIMITATIONS ON PUBLIC INDUSTRIAL FINANCING: AN HISTORICAL AND ECONOMIC APPROACH

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The widespread disillusionment resulting from the excesses of the railroad bond era of the nineteenth century caused a constitutional revolution among the states. New limitations on the financial powers of the states and their political subdivisions were adopted, including express restrictions on government economic aid to private enterprises. At the same time, the judiciary evolved a public purpose doctrine to complement the new constitutional provisions.

Since the adoption of the Mississippi Balance Agriculture With Industry plan (BAWI) in 1936, and especially since the end of World War II, a number of local and national economic problems have generated a twentieth-century counter-revolution. At first gradually, but now with increasing momentum, a considerable minority of jurisdictions have adopted statewide programs which authorize the investment of state and municipal funds [1] in factories and equipment as a means of inducing industrial development.[2] Several of these programs present no problem of state constitutional law as they are based on

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[1] Unless the context indicates otherwise, the terms "municipal" and "municipality" will be used to refer to all political subdivisions of the state.

[2] Public industrial financing is only one technique which has been utilized to encourage industrial development. Most states allocate considerable sums to advertising and personal solicitation. Technical staffs are made available to supply a

newly adopted amendments. The majority, however, resting solely on statute, do present constitutional difficulties which are the focus of this study.[3]

The Article divides itself into four major parts. First, the principal programs of public industrial financing currently in effect and the judicial reaction to them will be outlined. Second, the historical emergence of the constitutional limitations which are the subject of this study and the judicial application of them during the nineteenth century and the early decades of the twentieth century will be reviewed. Third, the application of these constitutional restrictions to modern industrial financing will be analyzed. Finally, the question of state tax exemption incident to public industrial financing will be discussed.

I. Economic Need and Legislative Response: The Current Public Industrial Financing Programs

A. The Mississippi Plan: Municipally Owned Plants Financed by General Obligation Bonds

The modern phase[4] of state industrial financing began in 1936 with the enactment by the Mississippi legislature of the BAWI plan.[5]

great variety of detailed information to prospective industry. See GILMORE, DEVELOPING THE "LITTLE" ECONOMIES 27-48 (1959). In addition, many southern states offer tax exemptions to new industry for specified periods of time. See Note, 59 COLUM. L. REV. 618, 626 n.66 (1959), where the pertinent constitutional and statutory provisions granting tax exemptions are set forth.

[3] See generally Note, *Legal Limitations on Public Inducements to Industrial Location*, 59 COLUM. L. REV. 618 (1959); Note, *State Constitutional Limitations on a Municipality's Power to Appropriate Funds or Extend Credit to Individuals and Associations*, 108 U. PA. L. REV. 95 (1959); Note, *The "Public Purpose" of Municipal Financing for Industrial Development*, 70 YALE L.J. 789 (1961).

[4] State governments have been encouraging new industry by offering subsidies and tax exemptions since colonial times. In 1662, Virginia granted a bounty of five pounds of tobacco for every yard of woolen cloth made in the colony. During the eighteenth century, Maryland, North Carolina, South Carolina, and Virginia offered bounties to encourage the production of several products. Public loans and land grants were likewise common. See HAWK, ECONOMIC HISTORY OF THE SOUTH 104-07 (1934); WRIGHT, ECONOMIC HISTORY OF THE UNITED STATES 87-88 (2d ed. 1949).

[5] The 1936 enactment, by its own terms, lapsed in 1940. The present legislation, enacted in 1944, is substantially the same. MISS. CODE ANN. §§ 8936-05 to 8938-08 (1956).

The BAWI program was not the first twentieth-century industrial financing program. It was preceded by at least one other, the Kansas industrial levy. Enacted in 1923, the Kansas statute originally authorized certain cities, and later by amendment all cities, to levy a tax "for the purpose of creating a fund to be used in securing industries or manufacturing institutions for such city . . . ." KAN. GEN. STAT. ANN. § 13-1441 (Supp. 1959). While some of the proceeds of the tax have been used for the purchase of land and buildings for lease to private industry, there has been uncertainty in the state as to whether the statute authorizes outright industrial financing of this kind, or is limited to expenditures designed to aid and encourage industrial expansion, such as advertising and installation of water mains and sewers. As a result of this uncertainty as well as other factors, such as the fluctuating attitudes of the voters in approving the levy, this program has not played an important role in Kansas. See HITE, THE INDUSTRIAL LEVY IN KANSAS 1-18 (Kansas Univ. Bureau of Business Research 1954).

Mississippi was faced with a short-run and a long-run problem.[6] The impact of the depression was severe. Both unemployment and underemployment were acute. Per capita income was at the desperate figure of 41% of the national average.[7] Further, to use the language of the economist W. W. Rostow, the state's basically agricultural economy was on the verge of its "take-off"—its first period of rapid, sustained, industrial growth.[8]

The legislature responded to these problems with a program of municipal industrial financing. The BAWI statute authorizes any municipality, upon approval of a project by its electorate and a state agency, to issue, within statutory limits, general obligation bonds to finance the construction of a plant, together with the necessary machinery and equipment, for long-term lease to a private industry.[9] The state agency is directed to issue a certificate of public convenience and necessity if it finds that there are sufficient natural resources and labor to support the proposed industry, and that the project will promote the economic objectives set forth in the statute.[10]

At the outset, nominal rentals made BAWI an outright subsidy program.[11] However, over the years, the philosophy of the administrators has moved away from that policy. Today, the objective is to fix rentals so that they will amortize the bonded indebtedness and pay the interest charges within the primary term of the lease.[12] Net leases are used whereby the lessee maintains the premises at his own expense and pays all insurance premiums. The primary term of the lease may be as high as twenty-five years with options to extend for seven-year periods at nominal rentals. A maximum term is fixed at ninety-nine years.[13] The lessee thus has an assured occupancy for the entire useful life of the facility. Elements of subsidy still remain, however, as rentals fail to reflect any charge for risk of loss or costs of administration, and tax exemptions are still provided.

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[6] HOPKINS, MISSISSIPPI'S BAWI PLAN 4-9, 17-18 (Fed. Reserve Bank of Atlanta, 1944); WALLACE, INDUSTRIALIZING MISSISSIPPI 2-3, 13-17 (Univ. of Miss. Bureau of Public Administration 1952).

[7] Survey of Current Business at 15, Aug. 1949.

[8] ROSTOW, THE STAGES OF ECONOMIC GROWTH 4-9, 17-18 (1960).

[9] MISS. CODE ANN. §§ 8936-08 to -09, -11, -13 (1956).

[10] MISS. CODE ANN. § 8936-08 (1956).

[11] HOPKINS, *op. cit. supra* note 6, at 3-6, 9, 29; WALLACE, *op. cit. supra* note 6, at 7-9, 27, 30.

[12] MISS. AGRICULTURAL & INDUSTRIAL BD., MISSISSIPPI'S BAWI PLAN 3 (undated); Letter From W. P. Starnes, Ass't Director, Miss. Agricultural & Industrial Bd., to David E. Pinsky, Dec. 16, 1960.

[13] MISS. AGRICULTURAL & INDUSTRIAL BD., MISSISSIPPI'S BAWI PLAN 3 (undated); Letter From Lester G. Franklin, Ass't Attorney General, State of Mississippi, to David E. Pinsky, Aug. 15, 1959.

Except for a four-year hiatus during World War II, the BAWI plan has been continuously in effect since 1936. Substantially similar programs are now in operation in at least six other jurisdictions,[14] five of which are southern or border states. As the Appendix indicates, total activity under the Mississippi plan, however, far exceeds that in any other state.

The Mississippi plan is attractive to industry because of the savings it passes on to the lessee. As public property, the land and plant are exempt from all state and local real property taxes.[15] In addition, municipal bonds are marketed at lower interest rates than private corporate bonds so that the lessee has less to amortize in rent. This interest saving springs from several factors. Because public financing pledges future taxes, government obligations are more attractive to investors even at lower interest rates than those of many small private enterprises whose ability to repay is uncertain. Moreover, income from municipal bonds is exempt from federal income taxes [16] while the bonds themselves are exempt from state personal property taxes [17] so that a lower interest rate does not really reduce net income. Further, in several states, municipal bonds are authorized as investments for banks, fiduciaries, and others who are traditionally regulated.[18] This facilitates their sale, without having to compete with other bonds by offering high returns.

B. The Revenue Bond Plan: Municipally Owned Plants Financed by Revenue Bonds

Beginning in 1946, a number of state legislatures enacted statutes authorizing municipalities to finance the construction and equipping of industrial plants by the issuance of revenue bonds. Although these plans are modeled on the BAWI program, they differ from it in that the bonds are payable only from the income produced by the facility rather than from general taxes. Though revenue bonds do not, therefore, rest entirely upon the credit of the municipality, the plans which utilize them offer to industry many of the features which make the

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14 Dyche v. City of London, 288 S.W.2d 648 (Ky. 1956) (construing a general borrowing enabling statute); ALA. CONST. amends. 84, 94, 95, 104, 128; LA. CONST. art. 14, § 14(b.2); MO. CONST. art. 6, § 23(a); MO. REV. STAT. §§ 71.790-.850 (Supp. 1961); N.D. CENT. CODE ANN. §§ 40-57-02 to -20 (Supp. 1961); TENN. CODE ANN. §§ 6-2901 to -2916 (Supp. 1962). The programs in Kentucky, North Dakota and Tennessee do not rest on any enabling constitutional amendment.

15 See notes 224-25 *infra* and accompanying text.

16 INT. REV. CODE OF 1954, § 103.

17 *E.g.*, MISS. CODE ANN. § 8936-17 (1956); TENN. CODE ANN. § 6-2913 (Supp. 1962).

18 LA. REV. STAT. § 9:2061(4) (1951); MISS. CODE ANN. § 421 (1956); TENN. CODE ANN. § 6-2914 (Supp. 1962).

Mississippi plan attractive.[19] Other closely related statutes permit the organization of local public corporations or authorities which have the power to construct industrial plants for long-term lease or sale to private industry.

At least fifteen states have one of these two related types of legislation.[20] A few of these are northern jurisdictions, but the only substantial implementation of these programs has been in Alabama, Kentucky, and Tennessee,[21] all states with per capita incomes of no more than 70% of the national average and still in the midst of their industrial take-offs.[22]

C. *The Pennsylvania Plan: Second Mortgage Loans Financed by Current Taxation*

The economic background of the Pennsylvania industrial financing program was very different from that of the BAWI and other southern plans. The economy of Pennsylvania reached maturity by World War I; by the end of World War II it was clearly in the post-maturity period. Certain sectors of the state's economy entered a period of severe decline, causing persistently high unemployment in many counties.[23] To meet these problems, the Pennsylvania legis-

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19 The land and the facility are generally exempt from property taxes. See notes 224-25 *infra* and accompanying text. While the public credit is not pledged, the interest rate on the bonds is for several reasons lower than many small enterprises could obtain. As in the case of general obligation bonds, the interest on revenue bonds is exempt from federal income taxes. Rev. Rul. 187, 1957-1 CUM. BULL. 65; Rev. Rul. 106, 1954 CUM. BULL. 28; *cf.* Bryant v. Commissioner, 111 F.2d 9 (9th Cir. 1940). This advantage has been condemned by many observers; see notes 51-53 *infra* and accompanying text. See generally Armstrong, *"Municipal Inducements"—The New Mexico Commercial and Industrial Project Revenue Bond Act*, 48 CALIF. L. REV. 58 (1960). In addition, many states make revenue bonds authorized investments for savings banks and insurance companies. *E.g.*, ALA. CODE tit. 37, § 511(29) (1958). Finally, the formal status of the bonds as governmental obligations may well make them more attractive to investors for other than economic reasons. Many investors, for example, are motivated by feelings of civic obligation. Letter From Ed. E. Reid, Executive Director, Alabama League of Municipalities, to David E. Pinsky, June 21, 1960.

20 Legislation authorizing municipalities to issue revenue bonds: ALA. CODE tit. 37, §§ 511(20)-(32) (1958); ARK. STAT. ANN. §§ 13-1601 to -1614 (Supp. 1961); GA. CODE ANN. § 87-802(a)(11) (Supp. 1961); ILL. ANN. STAT. ch. 24, §§ 8-4-1 to -22 (Smith-Hurd 1962); KY. REV. STAT. §§ 103.200-.280 (1959); MISS. CODE ANN. §§ 8936-51 to -69 (Supp. 1960); MO. CONST. art. 6, § 27; MO. REV. STAT. §§ 71.790-.850 (Supp. 1961); N.M. STAT. ANN. §§ 14-41-31 to -43 (Supp. 1961); N.D. CENT. CODE ANN. §§ 40-57-02 to -18 (1961); OKLA. STAT. tit. 62, ch. 2(d), §§ 2-16 (1961); TENN. CODE ANN. §§ 6-1701 to -1716 (1955); VT. STAT. ANN. tit. 24, §§ 2701-14 (1959); Kan. Sess. Laws 1961, ch. 81, §§ 1-11; Neb. Laws 1961, ch. 54, No. 159, at 200.

Legislation authorizing the organization of public corporations or authorities: ALA. CODE tit. 37, § 815-30 (1958); PA. STAT. ANN. tit. 53, § 306(A) (Supp. 1961); TENN. CODE ANN. §§ 6-2801 to -2820 (Supp. 1962).

21 See Appendix, pp. 326-27 *infra*.

22 U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 310 (1961).

23 The depletion of the state's forest resources led to the decline of the lumbering industry. The anthracite coal industry was severely affected by the pronounced

lature in 1956 enacted a new kind of industrial development program, under which the Pennsylvania Industrial Development Authority was created.[24] The Authority is authorized to make second mortgage loans from appropriations out of current revenues for industrial plant construction in areas of the state which have a substantial labor surplus as defined in the act.[25] The loans, however, are not made directly to industry, but to local non-profit industrial development corporations which in turn lease the factories to private enterprises. Under the typical financing pattern, the local non-profit development corporation constructs a plant for long-term lease to private industry. A first mortgage for 50% is obtained from a private lender; the Authority lends 30% on a second mortgage security for a term up to 25 years;[26] and the local non-profit development corporation invests the remaining 20%, often raising it by the sale of securities to local citizens.

In 1958, Kentucky adopted legislation substantially similar to the Pennsylvania program,[27] and variants have been enacted in two other jurisdictions.[28]

D. The New England Plan: State Insurance of First Mortgages

Like the economy of Pennsylvania, that of New England had developed weak sectors by the end of World War II.[29] In an attempt

shift in demand from coal to oil and gas for heating purposes. Railroad maintenance was for many years a major industry in many parts of Pennsylvania, but the dieselization of the railroads and the growth of competitive trucking industry have sharply reduced employment in many Pennsylvania communities formerly dependent on the railroad maintenance shops. In addition, there has been a southward exodus of the textile industry. See Davlin, *State Development Corporations: The Pennsylvania Experience*, 24 LAW & CONTEMP. PROB. 89 (1959); *Hearings before Subcommittee No. 3 of the House Committee on Banking & Currency*, 86th Cong., 1st Sess. 51-55 (1959); Fernstrom, *A Community Attack on Chronic Unemployment*, in Senate Special Committee on Unemployment Problems, *Studies in Unemployment*, 86th Cong., 2d Sess. 367 (Comm. Print 1960); *P.I.D.A.—A Look at State-Wide Ventures in Industrial Development*, FED. RESERVE BANK OF PHILA. BUS. REV. 3, 4 (July 1958).

[24] PA. STAT. ANN. tit. 73, §§ 301-14 (1960).

[25] PA. STAT. ANN. tit. 73, § 303(d) (1960).

[26] The statute does not fix either the maximum terms of the Authority's mortgage or the interest rate. The maximum term has been fixed by the Authority itself at 25 years. PA. DEP'T OF COMMERCE, 100% FINANCING FOR YOUR PLANT 1 (undated). Typical loans, however, are from 12 to 18 years. *P.I.D.A.—A Look At State-Wide Ventures in Industrial Development, op. cit. supra* note 23, at 7. The Authority has fixed the minimum interest rate at 2%, but actual interest rates have ranged from 2% to 5%, with an average rate of 2½%. GILMORE, *op. cit. supra* note 2, at 53; PENNSYLVANIA INDUSTRIAL DEVELOPMENT AUTHORITY, A QUESTION AND ANSWER SUMMARY 8 (undated).

[27] KY. REV. STAT. §§ 154.001-.170 (Supp. 1961).

[28] ARK. STAT. ANN. §§ 9-523, -532 (Supp. 1961). See note 5 *supra* for a discussion of the Kansas statute. See also the following two Arkansas Statutes which have recently been repealed: Ark. Acts 1957, No. 567, § 19 at 1475; Ark. Acts 1955, No. 404, § 34, at 1088.

[29] Technological changes, decline in certain industries, obsolete multistory buildings, and loss of certain industries such as textiles to the South are some of the

to remedy the situation, agencies have recently been created in Maine,[30] Rhode Island,[31] and Vermont[32] with the power to insure long-term first mortgage loans by pledging the credit of the state. These loans, made by private investors for industrial plant construction, may be insured in amounts as high as 90% of the project cost. The mortgagor must be a non-profit development corporation which intends to sell or lease the property to a private manufacturer.

The Pennsylvania and New England plans, despite obvious differences between them, have similar underlying economic and social approaches which differ markedly from those of the Mississippi plan. While BAWI provides 100% public financing, the northern plans seek to encourage the maximum possible financing from conventional private investment sources. In addition, unlike the Mississippi plan, the northern programs are initiated by local government groups, which serve as a potential check on government error. Moreover, the northern plans are based on a statewide tax or credit base in which many risks are pooled under one system, while BAWI is supported by a narrow municipal tax base in which even one loss can have a substantial effect on a municipality's total financial position. Lastly, while the Mississippi plan rests in part on state and federal tax exemptions, these play only a minor role in the northern programs.[33]

E. The Oklahoma Plan: State or Municipal General Obligation Bonds to Finance Mortgage Loans to Local Non-Profit Development Corporations

Legislative trends in the last five years reflect the impact of the Pennsylvania and New England formulas. Pursuant to constitutional

responsible factors. *Hearings Before Subcommittee No. 3 of the House Committee on Banking and Currency*, 86th Cong., 1st Sess. 161-165 (1959). The first response of New England legislatures to these economic problems was the creation of statewide development credit corporations chartered by special acts. Their purpose is to provide risk capital for promising industrial firms that cannot qualify for medium or long-term loans from commercial banks. See generally GILMORE, *op. cit. supra* note 2, at 140-51; Shils, *State Development Credit Corporations and Authorities and Problems of Financing Small Business*, and Anderson, *State Development Credit Corporations*, in SENATE COMM. ON BANKING & CURRENCY, DEVELOPMENT CORPORATIONS AND AUTHORITIES, 86th Cong., 1st Sess., 1, 28 (Comm. Print 1959).

30 ME. CONST. art. IX, § 14-A; ME. REV. STAT. ANN. ch. 38-B, §§ 1-14 (Supp. 1961).

31 R.I. GEN. LAWS ANN. §§ 42-34-1 to -18 (Supp. 1961). Article 4, section 13 of the state constitution provides that the credit of the state shall not be pledged for the payment of the obligation of others without the consent of the people. Article 4, section 14 provides that two-thirds of the members elected to each house of the legislature must assent to any bill appropriating public money for local or private purposes. Both provisions were complied with.

32 VT. STAT. ANN. tit. 10, §§ 201-215 (Supp. 1961).

33 If the non-profit development corporation raises its equity investment by the issuance of bonds, the interest on these obligations may be exempt from federal income taxes. Treasury Dep't, Treasury Ruling: I-FCD-5 (1959). This does not however, create a significant element of subsidy.

amendment, the Oklahoma legislature in 1959 adopted legislation creating a state authority with the power to make second mortgage loans to local development corporations financing industrial development projects.[34] The authority obtains its funds by issuing general obligation bonds. Variants of the Oklahoma plan have been adopted in New York,[35] Maryland,[36] and New Hampshire.[37]

New Hampshire diagnosed its needs differently than did other states. While not regarding the state as distressed, the legislature was concerned that the state's factories, largely of the multistory mill type, were fast becoming obsolete, and that the state would stagnate economically unless a sufficient number of modern plants were built to replace them.[38] The land potentially available for industrial development was largely unready in that it lacked water and sewerage connections and access roads. New Hampshire attempted to meet this problem by making available short-term construction loans for the preparation of sites as industrial parks and for the construction of plants.[39] Local development corporations are responsible for securing permanent financing from other sources.

F. The Curtailment of Sources of Long-Term Capital

The impact of the various economic developments that have stimulated legislation making available public funds for industrial development has been greatly intensified by certain profound institutional changes throughout the economy which have curtailed the availability of long-term capital for small business,[40] particularly manufacturing

[34] OKLA. CONST. art. X, § 34; OKLA. STAT. tit. 74, ch. 28, §§ 851-68 (Supp. 1962).

[35] N.Y. CONST. art. VII, § 8, art. X, § 7; N.Y. PUB. AUTH. LAW §§ 1800-49.

[36] MD. ANN. CODE art. 45A, §§ 1-3 (Supp. 1962) (mortgage loans by municipalities). Compare Md. Laws 1953, ch. 662, at 1462. Similar legislation was adopted in Arkansas pursuant to constitutional amendment, but it was recently repealed. Ark. Acts 1959, No. 121, §§ 1-10, at 341.

[37] N.H. REV. STAT. ANN. §§ 162-A:1 to -A:16 (Supp. 1961).

[38] See GILMORE, *op. cit. supra* note 2, at 50-51; letter from Winfred L. Foss, Secretary, N.H. Industrial Park Authority, to David E. Pinsky, July 13, 1960.

[39] See *ibid.*; N.H. INDUSTRIAL PARK AUTH., BIENNIAL REP. TO THE 1959 GENERAL COURT.

[40] See COMM. OF NEW ENGLAND OF THE NATIONAL PLANNING ASS'N, THE ECONOMIC STATE OF NEW ENGLAND, NEW ENGLAND'S FINANCIAL RESOURCES AND THEIR USE 1-21 (1953) [hereinafter cited as NEW ENGLAND]; BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM REP. TO THE COMM. ON BANKING & CURRENCY AND THE SELECT COMM. ON SMALL BUSINESS, 85th Cong., 2d Sess. 12-149 (Comm. Print 1958) [hereinafter cited as BOARD OF GOVERNORS]; *Hearings Before a Subcommittee of the Senate Committee on Banking & Currency, Financing Small Business*, 85th Cong., 2d Sess. 50-55 (1958); REPORT TO THE INDUSTRIAL DEVELOPMENT AND MIGRATION SUBCOMM. OF THE TENN. LEGISLATIVE COUNCIL, MIGRATION AND INDUSTRIAL DEVELOPMENT IN TENNESSEE 204-41 (1958) [hereinafter cited as TENNESSEE]; SMITH, EQUITY AND LOAN CAPITAL FOR NEW AND EXPANDING BUSINESS (W. E. Upjohn Institute for Employment Research); Cahn, *Capital for Small Business: Sources and Methods*, 24 LAW & CONTEMP. PROB. 27 (1959).

units.[41] A considerable alteration has occurred in the channels through which capital flows into productive investment. Increasing proportions of savings are going into institutional forms—life insurance, savings and loan associations, government bonds, pension funds, and trusts. Both legal and economic factors limit the power of these financial intermediaries to invest in long-term obligations or in equities. State laws generally fix the maximum amount of loans that can be made by state incorporated commercial banks in such a manner as to restrict the ability of many of them to make long-term loans for plant construction. In Tennessee, for example, only 29 of the 216 state incorporated banks can make loans of over $75,000.[42] Moreover, commercial banks must keep their loans quite liquid and are therefore limited to short or at most intermediate terms.[43]

Loans by life insurance companies to small business are likewise restricted by state regulatory legislation and by the general inability of small borrowers to meet credit standards as to earnings, stability, and management.[44] Insurance companies do not believe that the higher interest rate charged small borrowers adequately compensates the lender for these added risks. Similarly, law and custom combine to limit trust institutions and individual fiduciaries to "blue chip" investments.[45] Finally, high rates of personal and corporate income taxes and continued inflation also contribute to the gap in allocating savings to small business.[46]

The need for more long-term capital, particularly for small manufacturing units, is directly reflected in the state industrial development programs. They are generally intended to make public funds and credit available to manufacturing rather than other industrial enterprises. Several statutes explicitly impose this limitation,[47] while others, containing no such express restriction,[48] have been administered as if so limited.[49] Moreover, while none of the statutes expressly limit the size of projects to be financed, smaller business units have been the major beneficiaries.[50]

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41 BOARD OF GOVERNORS at 13.

42 TENNESSEE at 225-26.

43 See SMITH, *op. cit. supra* note 40, at 33.

44 See NEW ENGLAND at 18-19; TENNESSEE at 44, SMITH, *op. cit. supra* note 40, at 42-43; BOARD OF GOVERNORS at 32-35, 512-24.

45 NEW ENGLAND at 19.

46 *Id.* at 13.

47 ME. REV. STAT. ANN. ch. 38-B, § 5 (III) (Supp. 1961); KY. REV. STAT. § 103.200 (1959); TENN. CODE ANN. §§ 6-1702, 6-2902 (Supp. 1962).

48 *E.g.*, PA. STAT. ANN. tit. 73, § 303(i) (1960).

49 See PENNSYLVANIA INDUSTRIAL DEVELOPMENT AUTHORITY, REP. No. 10, SUMMARY OF LOAN ACTIVITIES, JULY 31, 1956-JUNE 21, 1960; *cf. In re* Opinion to the Governor, 155 A.2d 602 (R.I. 1959).

50 See GILMORE, *op. cit. supra* note 2, at 58-59. During the period July 31, 1956 to March 30, 1959, 60% of the projects approved by the Pennsylvania Industrial

G. The Policy Controversy

As might be expected in a private enterprise society, public industrial financing has met strong opposition. The Investment Bankers Association has recommended that its members "exercise extreme caution in underwriting or marketing [industrial financing] bonds." [51] Others have joined in the opposition.[52] The federal income tax exemption of income from municipal obligations, particularly revenue bonds, has been under persistent attack.[53] Commentators allege that public financing has been overemphasized at the expense of other factors far more crucial to industrial site selection.[54] There is also a genuine concern that the use of public credit to finance private industrial expansion will hamper the ability of state and local governments to improve other community services.[55] Furthermore, to the extent that public industrial financing becomes a weapon in the interstate struggle to attract new industry, the public participants may find that their losses from tax exemption and hampered borrowing power exceed their gains.

While it is not the objective of this study to focus on these vital questions of policy except to the extent that they are pertinent to constitutional issues, a brief digression may not be inappropriate. Regrettably, there has been a paucity of effort by economists to critically evaluate public industrial financing. The dearth of economic studies limits the lawyer's resources for intelligent judgment. The curtailment of sources of long-term capital, particularly those available to small manufacturers, and the failure of the federal government to adequately correct the situation, may justify some commitment of public funds or

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Development Authority involved project costs of $300,000 or less. See PENNSYLVANIA INDUSTRIAL DEVELOPMENT AUTHORITY, REP. No. 4, SUMMARY OF LOAN ACTIVITIES, JULY 31, 1956-MARCH 30, 1959.

[51] INVESTMENT BANKERS ASS'N OF AMERICA, MUNICIPAL INDUSTRIAL FINANCING 24 (1961).

[52] Resolution of the American Bar Ass'n, Section on Municipal Law (1952); Resolution of the Municipal Finance Officers' Ass'n (1953); *Panel Discussions Before House Ways and Means Committee, Income Tax Revision*, 86th Cong., 2d Sess. 339-46 (1959); S. REP. No. 1622, 83rd Cong., 2d Sess. 41 (1954); H.R. REP. No. 1337, 83rd Cong., 2d Sess. 33 (1954).

[53] *Ibid.* Bills have been introduced to remove the exemption for industrial financing revenue bonds, see, *e.g.*, H.R. 798, 87th Cong., 1st Sess. (1961); and to deny any deduction for rental paid by an industrial lessee to any state or local government, see, H.R. 6368, 87th Cong., 1st Sess. (1961).

[54] See FYFE, MUNICIPAL ASSISTANCE TO LOCATION OF INDUSTRY (1961); SOHN & BARNES, SURVEY OF EXECUTIVE ATTITUDES TOWARD MASSACHUSETTS AND NEW ENGLAND 52-58, 72-86, 90-92 (1955); UNIV. OF ALABAMA BUREAU OF PUBLIC ADMINISTRATION, LOCAL GOVERNMENT SERVICES AND INDUSTRIAL DEVELOPMENT IN THE SOUTHEAST (1952); *cf.* WALLACE, INDUSTRIALIZING MISSISSIPPI 51-52 (1952). See generally GREENHUT, PLANT LOCATION IN THEORY AND PRACTICE (1956).

[55] UNIV. OF ALABAMA BUREAU OF PUBLIC ADMINISTRATION, *op. cit. supra* note 54; Paty, *Local Government: Its Quality and Performance*, 2 J. PUB. L. 85 (1953). See generally Report of the Comm. On Industrial Development to the Southern Governors' Conference, Sept. 24-27, 1961.

credit by states with serious economic problems. However, since state programs are initiated and implemented in a context of interstate competition to attract new industries, it is difficult for any state to objectively draw a line between adequate and excessive allocation of public funds and credit for industrial financing. Only federal intervention can effectively provide the necessary restraint.

One suggestion for such intervention is that Congress deprive the states, municipalities, and their lessees of the federal tax advantages they presently enjoy. Such a step, however, might be looked upon as a punitive measure directed primarily at the South. In addition, any attempt to modify the tax-exempt status of industrial financing bonds would be opposed by many nonsouthern state and local government officials who would view it as an entering wedge for the complete elimination of the tax-exempt status of all municipal obligations.

Federal action linked to the Federal Area Redevelopment Act would be more acceptable.[56] Presently this statute prohibits federal financial assistance to aid industries in relocating.[57] Future amendments could, particularly if the amount of federal aid is expanded, require certain minimum fair standards for competition by states for new industry as a condition of eligibility for federal benefits. The creation of such standards would no doubt require careful consideration by the appropriate committees of Congress. However, until Congress takes such action, the danger that the states and municipalities will overcommit their limited resources in industrial financing will persist.

II. Economic Need and Judicial Response

The Supreme Court of Mississippi upheld the BAWI statute in 1938 in the landmark case of *Albritton v. City of Winona*.[58] Attacks based on the state constitutional prohibition against lending public credit to private enterprise and on the public purpose doctrine were rejected. The court analogized to the generally approved practice of governmental construction and leasing of transportation facilities. The *Albritton* decision marked a new phase in state constitutional law. Relying heavily on the critical nature of the economic problems sought to be remedied, courts in southern and border states followed *Albritton*.[59] Particularly noteworthy is the Maryland case of *City of Frost-*

[56] 75 Stat. 47 (1961), 42 U.S.C.A. §§ 2501-25 (Supp. 1961).

[57] 75 Stat. 50 (1961), 42 U.S.C.A. § 2505(a) (Supp. 1961).

[58] 181 Miss. 75, 178 So. 799, *appeal dismissed*, 303 U.S. 627 (1938).

[59] Andres v. First Arkansas Dev. Fin. Corp., 230 Ark. 594, 324 S.W.2d 97 (1959); Halbert v. Helena-West Helena Industrial Dev. Corp., 226 Ark. 620, 291 S.W.2d 802 (1956) (statute authorizing state to invest a portion of treasury surplus in bonds of local non-profit development corporations sustained in both Arkansas cases); Industrial Dev. Authority v. Eastern Ky. Regional Planning Comm'n, 332

burg v. Jenkins,[60] in which tax supported industrial financing was upheld by analogy to the long standing public practice of financing port facilities for use by water carriers. Related decisions permit port districts to exercise the power of eminent domain for port related industrial uses.[61] At the same time, however, a roughly equal number of courts—principally in northern jurisdictions—sharply rejected *Albritton*.[62] The judges ruled, either expressly or impliedly, that the urgency of need for public financing had no constitutional relevance.

Courts have also split on the validity of the revenue bond plans, with the weight of authority in favor of their validity.[63]

The basic difference in approach between the southern and northern courts lies in the consideration to be given to economic factors in constitutional decision. The difference, however, may be more apparent than real. Of the eight states in which industrial financing plans were sustained, six had a per capita income level of less than 80% of the average rate for the continental United States, and five had per capita income levels of 70% or less. On the other hand, all five states in which industrial financing legislation was invalidated had per capita income levels of 80% of the average national rate or better.[64] The contrast in the rates of unemployment of these states is also significant. Five of the eight jurisdictions which sustained industrial financing had, for virtually the entire twenty-four month period prior to the court

S.W.2d 274 (Ky. 1960) (Pennsylvania plan); Dyche v. City of London, 288 S.W.2d 648 (Ky. 1956) (Mississippi plan); City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957) (variant of Oklahoma plan); McConnell v. City of Lebanon, 203 Tenn. 448, 314 S.W.2d 12 (1958) (Mississippi plan).

[60] 215 Md. 9, 136 A.2d 852 (1957).

[61] Port of Umatilla v. Richmond, 212 Ore. 596, 321 P.2d 338 (1958); Atwood v. Willacy County Nav. Dist., 271 S.W.2d 137 (Tex. Civ. App.), *aff'd*, 153 Tex. 645 (1954), *appeal dismissed*, 350 U.S. 804 (1955).

[62] McClelland v. Mayor of Wilmington, 159 A.2d 596 (Del. Ch. 1960); State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952) (alternative holding); Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960); State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957); *cf.* Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959). While these decisions, with the exception of *Hogue*, all involve issues of revenue bonds, this in fact adds to their force, for the constitutional argument against the validity of revenue bonds is weaker than the case against general obligation bonds.

[63] Plans upheld: Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952); Wayland v. Snapp, 232 Ark. 57, 334 S.W.2d 633 (1960); Kansas *ex rel.* Ferguson v. City of Pittsburg, 188 Kan. 612, 364 P.2d 71 (1961); Bennett v. City of Mayfield, 323 S.W.2d 573 (Ky. 1959); Faulconer v. City of Danville, 313 Ky. 468, 232 S.W.2d 80 (1950); Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956); Darnell v. County of Montgomery, 202 Tenn. 560, 308 S.W.2d 373 (1957); Holly v. City of Elizabethton, 193 Tenn. 46, 241 S.W.2d 1001 (1951); *cf.* Opinion of the Justices, 254 Ala. 506, 49 So. 2d 175 (1950); West v. Industrial Dev. Bd., 206 Tenn. 154, 332 S.W.2d 201 (1960).

Plans held invalid: McClelland v. Mayor of Wilmington, 159 A.2d 596 (Del. Ch. 1960); State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952); Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960); State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957).

[64] See Table I, p. 327 *infra*.

ruling, rates of insured unemployment dramatically higher than the national average. In four of the five states which invalidated such legislation, the rate of insured unemployment prior to the decision was significantly lower than the national average.[65] The Washington court was the only one to strike down industrial financing legislation in the face of an unemployment rate markedly higher than the national average;[66] and it is noteworthy that this is the only invalidating decision which was the product of a divided court. These statistics must, of course, be viewed with caution. They do suggest, however, that economic conditions have been a significant factor in many judicial decisions. The figures indicate that favorable decisions may be expected in states where the economic need for them is strong, and invalidating decisions may be anticipated in states where economic need is less urgent. The probability of accurate prediction in the latter states, however, is less certain.

III. The Emergence of State Constitutional Provisions Prohibiting Public Financial Assistance to Private Enterprise

The state constitutional limitations which threaten to restrict current programs of public industrial financing cannot properly be analyzed without reference to their historical background. The history of these provisions has been related before and will be set forth here only summarily.[67] It begins during that frenetic period in American history, the railroad-aid bond era. During the 1830's and 1840's, the economies of the eastern states were preparing for and commencing their "take-offs." The construction of adequate social overhead capital, particularly railroads and canals, was an essential precondition of that development.[68] As pressure mounted for longer railroads to penetrate more sparsely settled areas, private capital was not readily forthcoming. A demand for the use of public credit accordingly developed. During the mid-nineteenth century, several state governments filled this financial vacuum by lending their credit or by borrowing in order to purchase railroad shares. The panic of 1837, however, forced a more sober approach, resulting in the first adoption of state constitutional

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65 *Ibid.*

66 Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959); see note 64 *supra.*

67 See generally Adams, Public Debts 301-06, 317-42 (1893); Cleveland & Powell, Railroad Finances 31-32 (1920); Hillhouse, Municipal Bonds 143-99 (1936); Secrist, An Economic Analysis of the Constitutional Restrictions Upon Public Indebtedness in the United States 13-44, 54-83 (1914); Wright, Economic History of the United States 280-86 (1949).

68 See Rostow, The Stages of Economic Growth 24-26, 38 (1960). Compare text accompanying notes 7-8 *supra.*

limitations on incurring state debt. But the constitutional changes adopted placed restrictions upon state debt only. It was generally assumed that the new limitations had no application to political subdivisions.[69] Legislatures freely authorized counties and municipalities to incur debt to aid railroad construction, and these units did so eagerly. The mood of euphoric optimism which prevailed was soon replaced, however, by one of disillusionment. Many railroad lines were abandoned as unprofitable, thus dangerously impairing the credit of the many municipalities which had financed them. The result was a second constitutional reaction, directed this time at restricting the financial activities of political subdivisions as well as of the states.

Debt limitations, provisions requiring electorate approval of borrowing, prohibitions against the state's becoming a party to any work of internal improvement, and prohibitions on financial aid to private enterprise were the principal constitutional limitations which emerged. The latter prohibitions are of particular interest in this study. Three principal types predominate. First, and most common, is the clause—referred to herein as the credit clause—which provides that the credit of the state and of its political subdivisions "shall not in any manner be given or loaned to or in aid of any individual, association or corporation." [70] A second type, almost as fashionable as the first, is a clause —referred to herein as the stock clause—which prohibits the state and political subdivisions from becoming stockholders in any corporation.[71] These two provisions were a direct response to two common methods of providing public financial assistance to railroads. One method was public guaranty of railroad bonds, which in some instances took the form of an exchange of railroad bonds for governmental obligations, the latter then being sold on the market by the private corporation.[72] In reality, the railroad was the principal debtor and the more attractive public credit was made available only to assist it in raising the neces-

[69] Prettyman v. Supervisors of Tazewell County, 19 Ill. 406 (1858); City of Aurora v. West, 9 Ind. 74 (1857) (internal improvement clause); Comm'rs of Leavenworth County v. Miller, 7 Kan. 479, 491-94 (1871) (internal improvement clause); Davidson v. Comm'rs of Ramsey County, 18 Minn. 482, 494-95 (1872); Benson v. Mayor of Albany, 24 Barb. 248, 258-59 (N.Y. Sup. Ct. 1857); Cass v. Dillon, 2 Ohio St. 607, 614-15 (1853); Clark v. City of Janesville, 10 Wis. 136, 170-75 (1859); Bushnell v. Beloit, 10 Wis. 195, 221-28 (1860). *Contra,* People *ex rel.* Bay City v. State Treasurer, 23 Mich. 499, 503-05 (1871).

[70] *E.g.,* PA. CONST. art. 9, § 6. This clause first appeared in the Rhode Island Constitution of 1842 as a limitation on the state in the absence of electorate approval. It next appeared in the New Jersey Constitution of 1844 (art. 4, § 6, par. 3) and the New York Constitution of 1846 (art. 7, § 9) as absolute limitations on the state.

[71] *E.g.,* PA. CONST. art. 9, § 6. This clause first appeared in the Iowa Constitution of 1846 (art. 8, § 2) as a limitation on the state.

[72] See, *e.g.,* Society for Sav. v. City of New London, 20 Conn. 174 (1860); Benson v. Mayor of Albany, 24 Barb. 248, 258 (N.Y. Sup. Ct. 1857); Rogan v. City of Watertown, 30 Wis. 259 (1872); see CLEVELAND & POWELL, *op. cit. supra* note 67, at 31-32.

sary capital. As a variant of this procedure, there were instances of the donation of county and municipal bonds to railroad corporations.[73] The credit clause was designed to eliminate these forms of financial aid to private enterprise. However, in the case of the political subdivisions, the other method—stock subscriptions—was by far the most common form of financial assistance.[74] Typically railroad stock was exchanged for public bonds, the latter, of course, being duly sold by the corporation on the market. Even though the public stock subscriptions were almost universally financed by borrowing, the legislatures and courts of the time drew a clear distinction between an exchange of bonds for bonds, prohibited by the credit clause, and an exchange of public bonds for railroad stock, which was viewed as a form of joint venture in the business of railroading not prohibited by the credit clause.[75] This distinction made necessary the stock clause as an additional constitutional safeguard against public financial assistance to the railroads.

The credit and stock clauses, however, did not erect any barrier against loans or donations financed out of current taxation, or against gifts of land.[76] A number of states, therefore, adopted additional prohibitions barring this type of aid, even though it did not occur in significant proportions. This third type of clause, somewhat less common than the credit and stock clauses, varies in wording from jurisdiction to jurisdiction. Pennsylvania's is typical in commanding the legislature not to authorize any political subdivision "to obtain or appropriate money for . . . any corporation, association . . . or individual." [77]

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[73] See, *e.g.*, Sweet v. Hulbert, 51 Barb. 312 (N.Y. Sup. Ct. 1868); Whiting v. Sheboygan & F.R.R., 25 Wis. 167 (1870) (act held invalid).

[74] See *e.g.*, Clarke v. City of Rochester, 24 Barb. 446 (N.Y. Sup. Ct. 1857, *aff'd*, 28 N.Y. 605 (1864); Cass v. Dillon, 2 Ohio St. 607 (1853); Nichol v. Nashville, 28 Tenn. 252 (1848). Municipal shareholdings were often substantial. At the close of the year 1851, for example, political subdivisions in Pennsylvania had subscribed to almost six million dollars of stock in the Pennsylvania Railroad as compared with private subscriptions of under two and one-half million dollars. See BURGESS & KENNEDY, CENTENNIAL HISTORY OF THE PENNSYLVANIA RAILROAD COMPANY 58 (1949).

[75] See note 156 *infra*.

[76] The language of the credit clause itself clearly does not embrace moneys paid out of current revenues. However, the only nineteenth-century decision so holding appears to be Merchants' Union Barb-Wire Co. v. Brown, 64 Iowa 275, 20 N.W. 434 (1884). Twentieth-century cases are all in accord. Industrial Dev. Authority v. Eastern Ky. Regional Planning Comm'n, 332 S.W.2d 274 (Ky. 1960); Opinion of the Justices, 337 Mass. 800, 152 N.E.2d 90 (1958); see Andres v. First Arkansas Dev. Fin. Corp., 230 Ark. 594, 324 S.W.2d 97 (1959); Halbert v. Helena-West Helena Industrial Corp., 226 Ark. 620, 291 S.W.2d 802 (1956). With respect to the stock clause, see note 156 *infra*.

[77] PA. CONST. art. 9, § 7 (applicable to municipalities). The New York clause is clearer and broader in prohibiting the giving or lending of money or property. See N.Y. CONST. art. 7, § 8, art. 8, § 1. More limited than both the Pennsylvania and New York versions is the clause adopted in Kentucky which is applicable only to the state and which is limited to donations. KY. CONST. § 177. The first clear version of the current appropriations clause appears to be article 9, section 10, of the Pennsylvania Constitution of 1873.

This type of provision will hereafter be referred to as the "current appropriations" clause, and the three clauses will be generically termed "public aid limitations."

At the turn of the century, some form of public aid limitation had been incorporated in the constitutions of a large majority of the states. For better or for worse, they are still with us, virtually unchanged. Although the public aid limitations took certain common forms, the pattern which has emerged throughout the country is not uniform. The constitutional movement of the nineteenth century was an extremely pragmatic one; each change in each state was a direct reaction to the specific evils which had manifested themselves in that and perhaps neighboring jurisdictions. Some constitutions therefore contain only a credit clause, others join to it a stock clause, and still others have all three. The potential for diversity is further intensified by the fact that any or all of these restrictions may apply only to the state, to counties, to cities and towns, or to a specified combination of these.[78]

It is appropriate at this point to consider in somewhat greater detail the specific evils to which the public aid limitations were addressed. The term "lending of credit," so popular in the nineteenth century but now relatively obsolete, is significant. A basic element of the railroad-aid schemes was the marketing of state and municipal obligations, without direct governmental control, by the corporation which was to receive the proceeds. The common pattern involved delivery to the railroad of governmental bonds payable to the corporation or bearer, either as a donation or in exchange for shares; the corporation in turn disposed of the bonds as it saw fit.[79] They were often sold in eastern markets for as low as 65 to 70 cents on the dollar.[80]

In addition, there was practically no public control over the planning of the railroad project or over the actual expenditures of publicly contributed funds. These functions were completely delegated to private corporate officials. To phrase it more dramatically, but no less accurately, there was a total abdication of public responsibility. Not infrequently, railroad planning was so speculatively conceived and incompetently executed that the proposed line was never completed. Waste and dishonesty in the expenditure of funds led to corporate insolvency and abandonment of routes. Finally, even if the road was completed and put into use, there was the danger of mismanagement in its operation, which was free from any significant government con-

[78] See note 91 *infra* and accompanying text.

[79] See, *e.g.*, City of Bridgeport v. Housatonic R.R., 15 Conn. 475 (1843). See generally Note, *County Subscriptions to Railroad Corporations*, 20 U. PA. L. REV. 737 (1872).

[80] See HILLHOUSE, *op. cit. supra* note 67, at 150; *cf.* Parkersburg v. Brown, 106 U.S. 487, 495 (1883).

trol.[81] The public was commonly burdened with enormous debt while its interest in improved transportation, which motivated projects in the first place, was completely or substantially frustrated.

The nineteenth-century experience which gave rise to the public aid limitations demonstrates that if public funds are to be risked, the risk must flow from public rather than private decision. Adequate protection of the public financial interest necessitates public control consonant with public financial risk. However, in several jurisdictions in which the state had directly participated in railroad and canal construction and operation, the constitutional revolution went even further. Provisions that "the state shall not be a party to, nor be interested in any work of internal improvement, nor engage in carrying on any such work" were adopted.[82] This type of clause, invariably drafted as a limitation on the state, has generally been interpreted not to limit political subdivisions.[83] Unlike the public aid limitations, the internal improvement clause is directed at financial risk flowing from public decision making as well as that incident to uncontrolled private decision making.[84]

The constitutional movement soon produced a complementary judicial reaction—the enunciation of the public purpose doctrine.[85] Its first clear articulation was by Chief Justice Black of the Supreme Court of Pennsylvania in 1853, in *Sharpless v. Mayor of Philadelphia.*[86] This was a taxpayer's suit which challenged the validity of several acts of the legislature authorizing the city to subscribe to stock in specified railroads, and to raise the necessary funds by borrowing. Although holding the statutes valid, the court declared that it was implicit in the state constitution that taxes could be levied only for public purposes. A statute which purported to tax for purposes clearly unrelated to government would be neither legislation nor taxation. A further implication of the opinion was that any purported tax statute which crossed the public-private barrier would violate the due process clause of the state constitution, as a taking of property for private use.

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[81] See HILLHOUSE, *op. cit. supra* note 67, at 152-53; see, *e.g.*, Garland v. Board of Revenue, 87 Ala. 223, 225, 6 So. 402, 403 (1889); Sun Printing & Pub. Ass'n v. Mayor of New York, 152 N.Y. 257, 268-69, 46 N.E. 499, 501 (1897).

[82] *E.g.*, MICH. CONST. art. 10, § 14.

[83] Commissioners of Leavenworth County v. Miller, 7 Kan. 479, 491-97 (1871); Cass v. Dillon, 2 Ohio St. 607, 614-15 (1853); Bushnell v. Beloit, 10 Wis. 195, 221-26 (1860), cited with approval in State *ex rel.* Martin v. Giessel, 252 Wis. 363, 371, 31 N.W.2d 626, 630 (1948). *Contra*, Attorney General *ex rel.* Brotherton v. Common Council of Detroit, 148 Mich. 71, 111 N.W. 860 (1907).

[84] See Rippe v. Becker, 56 Minn. 100, 114, 57 N.W. 331, 334 (1894); State *ex rel.* Jones v. Froehlich, 115 Wis. 32, 38, 91 N.W. 115, 116-17 (1902).

[85] See generally McAllister, *Public Purpose in Taxation*, 18 CALIF. L. REV. 137 (1930).

[86] 21 Pa. 147 (1853).

This substantive due process argument—as a matter of state constitutional law—was later more clearly enunciated by other courts,[87] and a number of state constitutions were amended expressly to incorporate the limitation.[88] Thus was fashioned a powerful new judicial tool. The public purpose doctrine was subsequently incorporated by the United States Supreme Court into the fourteenth amendment;[89] but it is now clear that the Court will defer to the state legislatures in the area of taxation so as to permit local economic experimentation.[90]

While the public purpose doctrine has been characterized by the courts as a limitation on the power to tax, it is more realistically a limit on the spending power, except in the unusual case of a special tax levied to finance a specific spending program. Both the public purpose test and the public aid limitations, therefore, perform the same general function as constitutional controls of expenditures.

IV. The Public Purpose and Public Aid Limitations in the Courts

Since the public purpose test goes no further than the public aid limitations, it need not be resorted to in any instance in which a specific constitutional provision is applicable to cases involving alleged public financial assistance to private enterprise, or, as it will be hereinafter referred to, the enterprise aid issue. However, as was noted earlier, the public aid limitations are not uniform in their applicability. Some states have no public aid limitations, and those that do usually have gaps in coverage, in that some governmental units are not limited or that no restriction is placed on the use of current appropriations.[91] The

[87] See Opinion of the Justices, 58 Me. 590 (1871); People *ex rel.* Bay City v. State Treasurer, 23 Mich. 498, 501-02 (1871).

[88] *E.g.*, Ky. Const. § 171. See McAllister, *supra* note 85, at 138 n.2.

[89] Jones v. City of Portland, 245 U.S. 217 (1917); *cf.* Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112, 158 (1896).

[90] The refusal of the Supreme Court to give the taxpayers any relief in Green v. Frazier, 253 U.S. 233 (1920) and Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, *appeal dismissed*, 303 U.S. 627 (1938) compels this conclusion.

[91] In order to determine the extent to which the various public aid limitations have been adopted and the diverse pattern which has emerged, a study of 30 state constitutions was made, limited to the credit clause and the current appropriations clause. (The stock clause is generally joined with the credit clause and, as explained in note 156 *infra*, is of little practical importance today.) The results of this 30 state study are as follows:

No credit clause limiting the state	2
Limited[a] credit clause limiting the state	1
No credit clause limiting political subdivisions[b]	6
Limited[a] credit clause limiting political subdivisions	4
No current appropriations clause limiting the state	16
Limited current appropriations clause limiting the state	1
No current appropriations clause limiting political subdivisions	16

[a] The term "limited" is used to refer to a limitation which is subject to being overridden by a specified procedure, such as a vote by the majority of voters in the municipality, or in the case of the state, a specified majority of the legislators. See, *e.g.*, Tenn. Const. art. 2, § 29.

[b] See note 196 *infra* and accompanying text.

public purpose doctrine, therefore, has independent significance in a large number of states. However, since the historical development of the public purpose test in enterprise aid cases has been very much influenced by judicial interpretation of the public aid limitations, it is unnecessary to treat the two types of restrictions separately in the historical discussion which follows.

A. Late Nineteenth Century

Several judicial developments during the late nineteenth century are noteworthy. One was the distinction between proprietary risk and enterprise aid risk. In *Walker v. City of Cincinnati*,[92] the Ohio court held that the credit clause did not prohibit municipal borrowing to construct a publicly owned railroad. The court ruled that the credit clause, unlike the internal improvement clause, was not directed at the risks incident to decision making by public officers—hereinafter referred to as proprietary risk—, but was designed to prohibit the assumption of financial risks flowing from private decision making—hereinafter referred to as enterprise aid risk. The court, placing the first important judicial gloss on the credit clause, stated that it interdicted only "a business partnership between a municipality or subdivision of the State, and individual or private corporations or associations." [93] The *Walker* case thus indicated the continued stress on the need for public control consonant with public financial risk.

Because many legislatures had adopted a credit clause directed only at the state,[94] litigation involving the validity of municipal railroad-aid bonds under the public purpose test was frequently before the courts. The majority of courts continued to adhere to the Pennsylvania view in the *Sharpless* case that an exchange of public bonds for corporate stock was valid under the public purpose doctrine.[95] Much reliance was placed on the vital economic importance of a viable transportation system and the quasi-public character of the railroads, illustrated by their exercise of the power of eminent domain, their common-law duty to serve the public without discrimination, and the power of the state to regulate their rates.[96] In dealing with manufac-

[92] 21 Ohio St. 14 (1871).

[93] *Id.* at 54. (Emphasis added.)

[94] See cases cited note 69 *supra*. Where a credit clause was expressly applicable, railroad-aid bonds were uniformly held invalid. See, *e.g.*, Whitney v. Kentucky Midland Ry., 110 Ky. 955, 63 S.W. 24 (1901).

[95] See cases cited note 69 *supra*, except for the *Bay City* case, 23 Mich. 499 (1871). *Contra*, Burlington & M.R.R.R. v. County of Wapello, 13 Iowa 388, 399-424 (1862) (dictum—later contradicted in Stewart v. Board of Supervisors, 30 Iowa 9 (1870)); People *ex rel.* Detroit & H.R.R. v. Township Bd., 20 Mich. 452 (1870).

[96] See Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 661-62 (1874); Stewart v. Board of Supervisors, *supra* note 95, at 19-26; Commissioners of Leavenworth County v. Miller, 7 Kan. 479, 519-536 (1871).

turing corporations, however, the state courts uniformly followed the Supreme Court decision in *Loan Ass'n v. Topeka*,[97] that the donation of municipal bonds to private corporations or their exchange for stock in such companies violated the public purpose test.[98] The quasi-public nature of the railroads, it was argued, distinguished them from other forms of private enterprise.

These decisions demonstrate that even in the early stages of the evolution of the public purpose doctrine, courts placed great emphasis on the need for public control adequate to insure that the economic objectives of the program—hereinafter referred to as the public purpose objectives—would not be frustrated. Donations of municipal bonds to railroad companies, therefore, were viewed by the judiciary in a considerably different light than the nondonative railroad-aid programs. Four courts—making up the numerical weight of authority in the nineteenth century—struck down such plans.[99] The rationale of their decisions is noteworthy. In *Whiting v. Sheboygan & F.R.R.*,[100] for example, the Wisconsin court distinguished between municipal purchase of railroad stock and donative aid on the ground that purchase made the municipality a part owner of the enterprise with legal remedies against the misapplication of corporate funds, while donation denied the public any such control. In addition to drawing a firm line between gratuitous and non-gratuitous aid, these four courts announced that in applying the public purpose test thereafter, they would more carefully scrutinize programs that pledged the public credit, in order to determine whether the public financial interest had reasonably been protected. It was made clear that the constitutional revolution that had given birth to the public aid limitations would have a marked impact on the judicial development of the public purpose test.

B. Twentieth-Century Needs Versus Constitutional Limitations

1. Public Control—Transportation, Recreation, and Parking: The Consumer Facility Cases

As the economy developed in the late nineteenth and early twentieth centuries, a new form of social overhead capital[101] became

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[97] 87 U.S. (20 Wall.) 655 (1874).

[98] *E.g.*, Central Branch U.P.R.R. v. Smith, 23 Kan. 745 (1880); Allen v. Inhabitants of Jay, 60 Me. 124 (1872); Weismer v. Village of Douglas, 64 N.Y. 91 (1876).

[99] Hanson v. Vernon, 27 Iowa 28 (1869) (per curiam); Detroit & H.R.R. v. Township Bd., 20 Mich. 452 (1870); Sweet v. Hulbert, 51 Barb. 312 (N.Y. Sup. Ct. 1868); Whiting v. Sheboygan & F.R.R., 25 Wis. 167 (1870).

[100] 25 Wis. 167 (1870).

[101] See Rostow, *op. cit. supra* note 68, at 24-26.

necessary—high speed urban transportation. The need for public financing was accordingly increasingly felt. Instead of a system of 100% public financing and operation, however, the dominant pattern which emerged was that of mixed public and private financing, with private operation in some cases and public operation in others.[102]

The proposed construction of the New York City elevated system produced the first case of direct challenge to a plan of municipal borrowing for the construction of a transportation facility which was to be leased to a private party on a long-term basis. Having failed to attract fifty-five million dollars in private capital, New York City determined to borrow that sum iteslf in order to construct the elevated and then lease the operation of it to a private party for a period of between thirty-five and fifty years. The rates to be charged by and the rules governing operations of the elevated were to be set by public officers. The plan was attacked as an unlawful loan of government credit to the operating corporation on the ground that the city was in reality borrowing the necessary capital and then lending the proceeds to the lessee, while the city retained only nominal title to the facility. In *Sun Printing & Publishing Ass'n v. Mayor of New York*,[103] however, the court, with two members dissenting, upheld the plan, emphasizing that it authorized spending public money for a public facility which would, for all time, constitute a part of the streets of the city. Private operation of the elevated was held to be ancillary to the dominant purpose of the plan, and would not render it an unconstitutional loan of credit. The court felt that it would have been anomalous to strike down a plan which harmonized so well the emphasis in our society on private enterprise with the absolute need for public financing.[104]

Perhaps the dominant proposition emerging from *Sun Printing* is that the so-called lease of the facility was more in the nature of a contract to operate than it was a conventional real property lease. By

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[102] In Boston, a state board of trustees took over the operation of a private corporation's entire urban transportation system. The state subsequently guaranteed a new issue of company bonds. Public operation, however, assured sufficient protection of the public financial and transportation interests so that the plan was upheld under the credit clause despite the fact that the term of the bonds was 40 years while state management could terminate in 15 years. Opinion of the Justices, 261 Mass. 523, 543-45, 159 N.E. 55, 65-66 (1927). For a somewhat similar decision arising out of the Boston transportation problem, see City of Boston v. Treasurer, 237 Mass. 403, 130 N.E. 390 (1921), *aff'd*, 260 U.S. 309 (1922).

[103] 152 N.Y. 257, 46 N.E. 499 (1897).

[104] The reasoning in *Sun Printing* has been followed by other courts. See, *e.g.*, People v. City of Chicago, 349 Ill. 304, 182 N.E. 419 (1932); Kittel v. City of Cincinnati, 78 Ohio App. 251, 69 N.E.2d 771, *appeal dismissed*, 147 Ohio St. 246, 70 N.E.2d 372 (1946); City Club v. Public Serv. Comm'n, 92 Pa. Super. 219, 231-32 (1927).

its control over the rates charged and the manner of operation, the municipality would be able to exercise sufficient control to insure that the public purpose objective—economical, frequent, high speed transportation—was attained.

Sun Printing may profitably be contrasted with *Lord v. City of Denver*,[105] a case arising out of the proposed construction of the Moffat Tunnel, west of Denver. A city commission had proposed to construct the tunnel at an approximate cost of four and one-half million dollars, two-thirds of which was to be raised by city borrowing and one-third by an interested railroad. The agreement between the city and railroad provided for title to be held by the city and the tunnel to be leased by it to the railroad at a rental designed to satisfy the interest on the public bonds and payments into a sinking fund. Once the municipal debt was retired, title was to pass to the railroad. The city, however, was to retain perpetual easements for water and electricity purposes. The railroad for its part covenanted to allow other carriers perpetual use of the tunnel tracks under specified terms and conditions.

The Colorado court looked upon the plan as a joint venture between the company and the city—or as a naked form of public financial assistance to the railroad—and therefore held it invalid under the credit clause. That the city took title was deemed of little significance in view of what realistically seemed to be a delayed contract of sale to the railroad. The perpetual easements granted to the city were characterized by the court as an incidental consideration rather than the dominant factor motivating the project. Further, the public interest in insuring that other railroads could use the tunnel at reasonable rates was held to be inadequately protected. In the *Denver* case, therefore, unlike *Sun Printing,* there was insufficient public control provided for the attainment of the public purpose objectives.

Post-World War II cases relating to government acquisition and leasing of recreation and off-street parking facilities continue to emphasize the need for adequate public control over the attainment of the public purpose objectives. In a leading Florida case, a municipality sought a decree validating a proposed issue of bonds, the proceeds of which were to be used for the construction of a marina, auditorium, and related facilities to be leased to a private corporation for a thirty-year term.[106] The proposed agreement between the municipality and the corporation reserved no power in the city to control the admission fee to be charged by the lessee or any other aspect of operations. Even

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[105] 58 Colo. 1, 143 Pac. 284 (1914).

[106] City of West Palm Beach v. State, 113 So. 2d 374 (Fla. Sup. Ct. 1959) (alternative holding).

though the bonds were obligations payable from a special fund and not general debt,[107] the court held the proposed plan invalid under the credit clause because of the city's surrender of control.

A number of other recent cases involving proposed leasing of publicly financed facilities indicate that the Florida result is not limited to applications of the credit clause but also occurs under the public purpose test and, when eminent domain is involved, under the public use limitation.[108] In a recent Rhode Island opinion, for example, a factual situation strikingly similar to that in the Florida case was presented.[109] The Rhode Island constitution contains no public aid limitations applicable to municipalities. Nevertheless, the court held that the failure of the municipal agency to reserve control over the manner of operation of the proposed facility invalidated the proposed issuance of bonds under the public purpose doctrine and the exercise of eminent domain under the public use requirement.

Urban renewal cases further reinforce the control principle. Legal attacks on the exercise of eminent domain for urban renewal purposes have often centered on the fact that the cleared land is promptly turned over to private redevelopers. In answering these attacks, supporters of renewal emphasize the significant degree of control reserved by the public agency in its redevelopment agreement and deed restrictions, both of which insure redevelopment and subsequent use of the land in accordance with the overall renewal plan.[110]

Modern cases in the fields of recreation, parking, and urban renewal, although small in number, give positive indication of a judicial tendency toward incorporating into the public purpose limitation on

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107 The bonds pledged the revenues from a utilities service tax in addition to the proceeds of the project. See State v. City of Tampa, 72 So. 2d 371 (Fla. Sup. Ct. 1954).

108 City of San Francisco v. Ross, 44 Cal. 2d 52, 279 P.2d 529 (1955) (eminent domain and general obligation borrowing); Opinion to Governor, 76 R.I. 365, 70 A.2d 817 (1950); see Ventura Port Dist. v. Taxpayers of Ventura Port Dist., 53 Cal. 2d 227, 347 P.2d 305 (1959) (authority bonds); City of Daytona Beach v. King, 132 Fla. 273, 181 So. 1 (1938). Although the respective state constitutions contain a credit clause applicable to municipalities, the opinions in both the *Ventura* and *Daytona Beach* cases rest on the public purpose test. *Cf.* Foltz v. City of Indianapolis, 234 Ind. 656, 130 N.E.2d 650 (1955); State *ex rel.* Hawks v. City of Topeka, 176 Kan. 240, 270 P.2d 270 (1954). Both *Foltz* and *Hawks* involve the exercise of eminent domain and financing by bonds payable from project revenues and revenues of a related facility. *Cf.* Zachry v. City of San Antonio, 296 S.W.2d 299 (Tex. Ct. Civ. App. 1956) (lease of city land). *But cf.* Cabot v. Assessors of Boston, 335 Mass. 53, 63 n.1, 65-68, 138 N.E.2d 618, 625 n.5, 626-28 (1956), *appeal dismissed*, 354 U.S. 907 (1957) (tax exemption).

109 Opinion to Governor, *supra* note 108.

110 See Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 143-45, 104 A.2d 365, 369-70 (1954); Velishka v. City of Nashua, 99 N.H. 161, 168, 106 A.2d 571, 575-76 (1954); Davis v. City of Lubbock, 160 Tex. 38, 48-51, 326 S.W.2d 699, 706-08 (1959).

expenditures and the public use limitation on the power of eminent domain the same requirement of public control over effectuation of the public purpose objectives as has been applied under the credit clause.

Although twentieth-century cases have focused on the adequacy of public control with respect to the effectuation of the public purpose objectives, analysis of them in the light of the nineteenth-century evils sought to be remedied—that is from the standpoint of public control consonant with financial risk—is illuminating. It is apparent that the twentieth-century formula of government ownership and private lessee operation remedies the first two evils of the railroad-aid bond era—lack of public control over the marketing of the public debt, and over the planning and construction of the facility. In the few modern cases in which the municipality failed to provide for control of the construction of the project, the proposed financing program was held invalid under the credit clause.[111]

The third danger which the public aid limitations sought to prevent relates to the risks which result from lack of government control over the current operations of publicly owned enterprises. It is clear that the municipality's title to the facility under the modern formula constitutes a significant safeguard. Regardless of the financial imprudence or recklessness of the lessee, the public financial interest in the facility itself is protected. Nevertheless, there remains a significant residue of financial risk. The public interest demands a maximum assured rental, particularly while the debt is outstanding, yet percentage rentals have been approved,[112] and at least two courts have upheld leases wherein the rental payments were contingent upon earnings and made junior to debt service on the company's debt and dividends on a portion of its stock.[113] These arrangements have apparently been approved on the ground that there is a sufficient residuum of public control reserved over the lessee's operations.

In addition to lease provisions, long-run economic and social changes are ever present sources of financial risk. Population shifts or

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111 Griffin v. Jeffers, 221 Ala. 649, 130 So. 190 (1930); *In re* Opinion of the Justices, 276 Mass. 617, 176 N.E. 607 (1931).

112 People v. City of Chicago, 349 Ill. 304, 182 N.E. 419 (1932); Frankenstein v. Goodale, 30 Ohio App. 110, 164 N.E. 363 (1928).

113 People v. City of Chicago, 349 Ill. 304, 337-41, 182 N.E. 419, 435-37 (1932); Admiral Realty Co. v. City of New York, 206 N.Y. 110, 99 N.E. 241 (1912). *But see* State *ex rel.* Campbell v. Cincinnati St. Ry., 97 Ohio St. 283, 119 N.E. 735 (1918). While it was not apparent in *Sun Printing*, the above cases reveal that long-term leasing of transportation facilities generally involves a union of private and public capital in apparent violation of the *Walker* case dictum. Rolling stock and working capital are joined with publicly owned subway tunnels and elevated structures. This has tended to lead to an intimate integration of the company's and the city's debt structure in the manner indicated in the text.

widespread economic recession may cause the number of subway riders to fall significantly, thus producing financial losses to the municipal owner. These risks, however, are inevitable concomitants of public decision making. Such basic decisions as whether to build the subway and what route to select are public decisions. Accordingly, the *Denver* case and those which followed it, in invalidating certain leasing arrangements in which private decision making was a factor, demonstrate that in applying the public control criteria, twentieth-century courts have gone beyond those of the nineteenth in placing their crucial emphasis on public control over the effectuation of the public purpose objectives.

2. Urgency of Need: The Port Facility Cases

In the cases applying the public purpose doctrine and the public aid limitations to the fields of transportation, recreation, and parking, courts have placed considerable emphasis on the public importance of the project and the urgency of the need for public financing.[114] These factors have been most stressed, however, in the area of municipal construction of port facilities for long-term lease to private parties.[115] Courts have uniformly upheld use of the eminent domain power [116] and public financing by the issuance of general obligation [117] and revenue bonds [118] for such purposes.

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[114] The urban transportation cases, note 113 *supra*, approving lease arrangements wherein the rental payments to the municipal lessor are made junior to interest on the lessee corporation's debt and dividends on a portion of its stock, demonstrate that when the public importance of the objective and the urgency of the need for public financing are great enough, concern for protection of the public financial interest will be relaxed.

[115] Public financing of port facilities for private operation has a long history. It is clear that by the mid-nineteenth century the practice was well established in New York City. GRIFFIN, THE PORT OF NEW YORK 7 (1959). The practice in New York has, in fact, been traced back to the latter part of the seventeenth century. Sun Printing & Publishing Ass'n v. Mayor of New York, 8 App. Div. 230, 287, 40 N.Y. Supp. 607, 647 (1896) (dissenting opinion), *aff'd*, 152 N.Y. 257, 46 N.E. 499 (1897).

[116] *In re* Mayor of New York, 135 N.Y. 253, 31 N.E. 1043 (1892); Dyer v. Mayor of Baltimore, 140 Fed. 880 (C.C. Md. 1905), *appeal dismissed*, 201 U.S. 650 (1906); Marchant v. Mayor of Baltimore, 146 Md. 513, 126 Atl. 884 (1924).

[117] City of Oakland v. Williams, 206 Cal. 315, 274 Pac. 328 (1929); State *ex rel.* McElroy v. Baron, 169 Ohio St. 439, 160 N.E.2d 10 (1959); Paine v. Port of Seattle, 70 Wash. 294, 127 Pac. 580 (1912); see Visina v. Freeman, 252 Minn. 177, 89 N.W.2d 635 (1958). In the above cases, public financing was upheld under the credit clause. *Cf.* Harrison v. Day, 200 Va. 764, 107 S.E.2d 594 (1959) (current appropriations).

[118] Sigman v. Brunswick Port Authority, 214 Ga. 332, 104 S.E.2d 467 (1958); North Carolina State Ports Authority v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955); Harrison v. Day, 202 Va. 967, 121 S.E.2d 615 (1961).

In analyzing public financing of port facilities, it is essential to differentiate between the leasing of marine terminals which serve all carriers, and that of piers which are used exclusively by one carrier. In the case of terminals, the municipality can substantially regulate wharfage charges and other aspects of operation. The control which can be exercised is similar to that exerted in the consumer facility cases. In the case of piers, however, it is constitutionally impossible for the municipal lessor to control the rates and services of water carrier lessees who are engaged in interstate and foreign commerce. Moreover, relatively short-term leases can be used effectively, in the case of marine terminals, to afford the municipality the opportunity of periodically reviewing the lessee's activities.[119] The carrier lessee, however, like the industrial lessee, will usually want the security of a long-term lease, or at least an option to extend a shorter term; and the municipality for its part may not desire to pledge its credit unless the term is sufficiently long so that rental payments will amortize the principal and pay the interest on its debt.

While case authority exists for the use of eminent domain for the construction of public piers which will be leased on a long-term basis for exclusive use by a single carrier,[120] direct support for public financing of such facilities is scant.[121] If the public control requirement, as articulated in the consumer facility cases, is applied, such financing cannot be sustained. Nonetheless, the author has found no holding that public financing for this purpose is invalid under the credit clause

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119 See generally U.S. COMM'R OF CORPORATIONS, REPORT ON TRANSPORTATION BY WATER IN THE UNITED STATES pt. III, at 6 (1910).

120 See cases cited note 116 *supra*. The following cases have also approved the exercise of eminent domain in port areas and subsequent leasing for port and port related industrial purposes. Port of Umatilla v. Richmond, 212 Ore. 596, 598-620, 321 P.2d 338, 340-50 (1958); Atwood v. Willacy County Nav. Dist., 271 S.W.2d 137 (Tex. Ct. Civ. App. 1954), *appeal dismissed*, 350 U.S. 804 (1955). *But see* Hogue v. Port of Seattle, 54 Wash. 2d 799, 82 N.W.2d 269 (1957) (sale rather than lease).

121 The California Supreme Court, in City of Oakland v. Williams, 206 Cal. 315, 274 Pac. 328 (1929), upheld municipal general obligation bond financing of a warehouse building in the port area which was to be leased for a ten-year term to a firm engaged in packing, processing, and shipping dried fruit. The court rejected arguments based upon the public purpose test and the credit clause. The court was completely silent on the importance, if any, of the limited term lease. *Cf.* Visina v. Freeman, 252 Minn. 177, 189, 89 N.W.2d 635, 646 (1958). In contrast, the Washington court in Paine v. Port of Seattle, 70 Wash. 294, 322, 127 Pac. 580, 582 (1912), approved a proposed lease of a marine terminal which was for a "limited time" and which provided for municipal control over wharfage charges. The Ohio court, in State *ex rel.* McElroy v. Baron, 169 Ohio St. 439, 160 N.E.2d 10 (1959), similarly passed on a limited term lease. The statement in *Paine* on control of wharfage charges, however, must be construed in the context of the facts of the case—a proposed leasing of a marine terminal. The court did not address itself even by way of dictum to the question of leasing a pier for the exclusive use of a carrier. Both the Washington and Ohio courts were unclear as to how they construed "limited time." *Paine*, in fact, approved a thirty-year term.

or the public purpose test.[122] Despite the lack of direct authority, there is good reason to believe that public financing of port facilities for long-term lease to water carriers is an accepted part of our jurisprudence even though the lessor retains no control over the operation of the facility, other than to limit the lessee to waterfront uses.[123] The validity of this type of public financing was not at issue in the eminent domain cases, but it must have been perfectly clear to the courts that public financing was involved. The practice of leasing publicly owned piers to steamship companies, often for long terms, is of long standing, and should therefore be accorded respect by the courts.[124] In addition, even though the degree of control over the water carrier lessees which can be exercised by the municipality is small, the lessees are common carriers subject to common-law duties[125] and gradually expanding federal regulation.[126] This regulation, together with the program of federal subsidies,[127] serves to place water carriers in a very special category, much like the nineteenth-century railroad. Moreover, the historically asserted government interest in the control and development of ports further justifies special treatment of this type of municipal activity.[128] This concern is based on both the vital importance of ports

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122 *But cf.* Paine v. Port of Seattle; State *ex rel.* McElroy v. Baron, *supra* note 121.

123 See State *ex rel.* McElroy v. Baron, *supra* note 121, at 444, 160 N.E.2d at 13-14; *cf.* City of Douglas v. Douglas Canning Co., 161 F. Supp. 379 (D. Alaska 1958). *But cf.* Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co., 82 Mo. 121 (1884).

124 See, *e.g.*, *In re* Mayor of New York, 135 N.Y. 253, 31 N.E. 1043 (1892); Dyer v. Mayor of Baltimore, 140 Fed. 880 (C.C. Md. 1905), *appeal dismissed*, 201 U.S. 650 (1906); City of Oakland v. Williams, 206 Cal. 315, 274 Pac. 328 (1929); see ALBION, THE RISE OF NEW YORK PORT 222 (1939). Twenty-three piers owned by the City of New York were under lease to steamship companies in 1952, twenty-one of which were being used by steamship companies under a permit. N.Y. CITY DEP'T OF MARINE AND AVIATION, PORT PROGRESS REPORT 33 (1952). On the other hand, only one of the thirteen municipally owned piers in Philadelphia which are leased for port commerce purposes is leased for the exclusive use of a water carrier. Letter From Peter Schuffler, Deputy Director of Commerce, City of Philadelphia, to David E. Pinsky, Sept. 26, 1960. Furthermore, long-term leases have not been uncommon. New York City leases now extend for as long as twenty years. See GRIFFIN, *op. cit. supra* note 115, at 90. A federal agency report in 1909 criticized the large number of long-term pier leases in New York and Baltimore. U.S. COMM'R OF CORPORATIONS, *op. cit. supra* note 119, pt. III, at 6, 11.

125 *In re* Mayor of New York, 135 N.Y. 253, 31 N.E. 1043, 1046 (1892), placed emphasis on this factor, in approving the exercise of eminent domain by the City of New York to acquire waterfront land to be used for the construction of piers for long-term lease to water carriers.

126 See AUERBACH & NATHANSON, THE FEDERAL REGULATION OF TRANSPORTATION, 28-31, 35-38 (1953); Zoll, *The Development of Federal Regulatory Control over Water-Carriers*, 12 ICC PRAC. J. 552 (1945).

127 See AUERBACH & NATHANSON, *op. cit. supra* note 126, at 31-32.

128 See Commissioner v. Ten Eyck, 76 F.2d 515, 517-18 (2d Cir. 1935); *Ports and Harbors*, 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 258-60 (1937). The ownership and control of port facilities was historically regarded in England and Scotland as a part of the royal prerogative. See GOULD, WATERS § 14 (3rd ed. 1900).

to economic development and to national defense. Judicial opinions and statutes have emphasized that public financing of port facilities is looked upon as part of a comprehensive plan for the development of the port.[129]

Economic considerations buttress the modern legal acceptance of public financing of port facilities for long-term lease to water carriers. The fact that an exceedingly small number of piers are owned by steamship companies suggests [130] that public financing is needed because private capital has not been forthcoming for this purpose. This need for public financing is consistent with the concept that governments can finance social overhead capital,[131] which should be defined to encompass port facilities. This form of capital has three characteristics: a large investment is essential; the time needed to pay off such investments is usually long; and by its very nature, social overhead capital indirectly benefits the community as a whole rather than the initiating entrepreneurs. Because of these attributes, government units have often been compelled to supply the economy's need for social overhead capital. Piers and related port facilities clearly have the second and third characteristics of such capital, and the first to a somewhat lesser extent; in fact, transportation facilities are generally deemed to be the classic example of social overhead capital.

The port facility cases illustrate very pointedly that where attainment of the public purpose objectives is deemed sufficiently vital and the need for public capital sufficiently urgent, the requirement of public control under public financing will be substantially relaxed.

In summary, the history of the judicial application of the credit clause to the enterprise aid issue in areas other than industrial financing can best be explained as an attempt to balance two somewhat conflicting criteria. The courts first look to the degree of public control exercised over private decision making. This in turn can be analyzed from two vantage points—public control exerted to insure the effectuation of the public purpose objectives, and public control exerted for the protection of the public investment.[132] Twentieth-century courts have

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129 City of Oakland v. Williams, 206 Cal. 315, 274 Pac. 328, 332-34 (1929); Marchant v. Mayor of Baltimore, 146 Md. 513, 521, 126 Atl. 884, 887 (1924); *cf.* Paine v. Port of Seattle, 70 Wash. 294, 318, 323, 127 Pac. 580, 583 (1912).

130 In 1951, there was only one steamship owned pier in Boston, three in New York, none in Philadelphia, seven in Baltimore, and none in Norfolk. MOTT, A SURVEY OF UNITED STATES PORTS 66, 141, 167, 59, 150 (1951).

131 The discussion of social overhead capital which follows is based on ROSTOW, THE STAGES OF ECONOMIC GROWTH 17-18, 24-26 (1960).

132 The nature of the citizen's interest in the effectuation of the public purpose objectives of any public program will in many instances conflict with his interest in protecting the public financial interest. In the case of a municipally financed off-street parking garage, for example, the citizen's interest in protecting the public financial interest is a narrow one; he is interested in minimizing the direct financial

placed maximum emphasis on the former. The second criterion applied by the courts is the urgency of the need for public financing and the availability or nonavailability of reasonable alternative sources of capital to accomplish the public purpose objectives without sacrificing the public control requirement. Public financing of port facilities for long-term lease as exclusive carrier piers seems to be the only significant area in which urgency of need for public financing has achieved dominance and virtually submerged the public control requirement.

These two criteria—the degree of public control exercised and the urgency of the economic need—will be referred to hereafter as the enterprise aid criteria. With respect to the application of the public purpose test in states with no pertinent public aid limitations and the application of the public use limitation on eminent domain, although the number of cases is small, the evidence suggests that the same criteria have been employed and the same balance achieved.

V. The Tax Supported Plans

Analysis of the application of the public aid limitations and the public purpose test to the current programs of state and municipal industrial financing may now be undertaken. The contrast between the several tax supported and revenue bond plans, however, is sufficiently fundamental to warrant separate treatment of the two categories. The objective of this section is two-fold: to apply the enterprise aid criteria to the tax supported plans in order to determine the extent to which these plans depart from the body of decisional law discussed earlier; and to consider whether these departures can be harmonized with the historical guidelines underlying the public aid limitations and the public purpose doctrine.

A. Application of the Enterprise Aid Criteria to the Mississippi Plan

1. The *Albritton* Rule Contrasted With the Rule of the Consumer Facility Cases

The objectors in the *Albritton*[133] case alleged that the BAWI statute authorized outright municipal financial assistance to private enterprise in violation of the state constitution's credit clause and the public purpose doctrine. The overwhelming weight of authority up to

loss incident to the enterprise, and if possible, in making it self-sustaining. This may mean, for example, closing the garage from 2 a.m. to 6 a.m. and raising rates. On the other hand, optimum effectuation of the public purpose objectives of the project may best be realized by 24-hour operation and low rates, even though direct financial losses result.

[133] Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, *appeal dismissed*, 303 U.S. 627 (1938).

that time had held that governmental financial aid to private manufacturers, by subsidies or guarantees of credit, violated both the credit clause and the public purpose test; this was hornbook law from Dillon [134] to McQuillin.[135] Virtually every case cited in the treatises, however, had involved either outright donations of public property or bonds to a private corporation, or an exchange of municipal bonds for corporate stock or bonds, and were thus reasonably distinguishable from the BAWI plan. However, the Mississippi case of *Carothers v. Town of Booneville,*[136] decided shortly before *Albritton,* had involved a program of municipal plant construction for long-term lease to private industry, thus closely resembling the BAWI plan. The statute contested in *Carothers* had been declared invalid by the court four years prior to the *Albritton* decision.

The *Albritton* court, however, had before it a statute well fortified against the anticipated assault. The proposed project in *Carothers* had been authorized by special legislation, no doubt pushed through the Mississippi legislature in response to local pressure. It therefore lacked any legislative finding of economic justification. In *Albritton,* however, the court for the first time was faced with a statute which launched an industrial financing program of general applicability throughout the state and which carefully set forth legislative findings of economic need justifying the pioneering legislation. Moreover, in *Carothers* the court had emphasized that because the municipality was not authorized to operate the proposed plant itself, the statute permitted outright financial assistance to a private manufacturing enterprise in violation of the credit clause and the public purpose test. The BAWI statute, however, had been carefully drafted to avoid the *Carothers* objection by authorizing a municipality to operate a factory itself as well as to lease it to a private party. It seems reasonably clear that the legislature and the interested public officers did not anticipate any municipal operation, but had incorporated that alternative power into the statute to bolster it against legal attack.[137] This defensive strategy proved successful, for the statutory authorization for municipal operation became, in essence, the anchor of the court's opinion. Taking an expansive view of the state's power to assume functions theretofore not exercised by government when economic and social conditions so dictated, the court held that the BAWI statute validly authorized the use of municipal credit for construction of a new but necessary type of

134 2 DILLON, MUNICIPAL CORPORATIONS § 884, at 1364-65 (5th ed. 1911).

135 15 McQUILLIN, MUNICIPAL CORPORATIONS §§ 43.30, 39.26, at 74-75 (3d ed. 1950).

136 169 Miss. 511, 153 So. 670 (1934).

137 See HOPKINS, MISSISSIPPI'S BAWI PLAN 16-20 (Fed. Reserve Bank of Atlanta, 1944).

public facility. Should the municipality prefer tenant rather than government operation, the lessee, according to the court, would be "the municipality's agent for operating the industry. . . ." [138]

If the BAWI statute had not authorized municipal operation, the court's position would have been untenable; but the judges felt very much at ease with a scheme granting municipalities the power to construct a public facility with the optional power to operate it themselves or through a lessee. The court found support in the transportation leasing cases. However, municipal power to build a facility which municipalities were, in fact, legally without power to operate and which was to be leased for a long term to a private party was a novel concept, difficult to distinguish from direct financial assistance to private enterprise. In upholding the BAWI statute, the court thus relied heavily on the pro forma statutory authorization of municipal operation.

Having distinguished *Carothers,* one major obstacle remained for the court—to harmonize its decision with the enterprise aid criteria. It attempted to do so by imposing a requirement that leases under the statute set forth "the character and capacity of the proposed industry, and [provide] for the termination of the lease if the lessee fails within a specified time to . . . operate the industry as described . . . or discontinues for a specified time thereafter to so operate it." [139] Such a lease, it appears fairly certain, would give the municipality authority to prevent conversion of the facility to a use less desirable to the community than that originally contemplated.[140] While the *Albritton*

[138] Albritton v. City of Winona, 181 Miss. 75, 107, 178 So. 799, 807, *appeal dismissed,* 303 U.S. 627 (1938).

[139] *Id.* at 107, 178 So. at 808; *cf.* City of Douglas v. Douglas Canning Co., 161 F. Supp. 379 (D. Alaska 1958); Ferrell v. Doak, 152 Tenn. 88, 92, 275 S.W. 29, 30 (1925).

[140] The *Albritton* standard is implemented in Mississippi by a standard lease provision that if the lessee abandons the premises or discontinues manufacturing operations for a period of one year, the municipality may terminate the lease without discharging the lessee from liability for rent. MISS. AGRICULTURAL & INDUSTRIAL BD., ATTITUDE IN ACTION, form 5, para. 12. Whether the municipality can exercise its right of termination for breach of the covenant restricting use of the premises without a successor lessee being reasonably available, and then proceed to hold the lessee liable for rent while the plant remains vacant, is a question subject to considerable doubt. Such action by the municipality would subject the lessee to a penalty without yielding any apparent advantage to the municipality. However, as a practical matter the municipality would only be interested in enforcement if a successor lessee who agrees to conform to the covenants limiting use is found.

Compare the following lease provision, in common use in Kentucky under the revenue bond plan:

> Immediately upon the completion of the industrial building and the installation of operating machinery and equipment the Company intends during the term of this lease and until January 1, 1980, to use and occupy the said building primarily in the processing and manufacture of vehicular rubber tires or other products as determined from time to time by the Company, as distinguished from warehousing space where employment of factory workers is not important. The Company does not now know of any reasons why the said building will not be so used and occupied by it for such period and anticipates that it will be so used and occupied by it in the

rule is hardly a strict one, it at least recognizes a need to adopt in modified form the control requirement of the consumer facility cases. The decisions which have followed *Albritton,* however, have ignored the problem.[141]

The actual degree of government control over the effectuation of the public purpose objective achieved under the *Albritton* rule, however, falls far short of that required in the consumer facility cases. If the requirements imposed in the latter cases were insisted upon in the field of industrial financing, leases would have to include provisions requiring a minimum weekly payroll, minimum wage rates, and minimum working standards.[142] None of the modern industrial financing programs, however, provide municipal control over any of these sub-

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absence of supervening circumstances not now anticipated by it or beyond its control. The Company agrees that when such building is used and occupied during the term of this lease or until January 1, 1980, it will be used primarily only in the processing and manufacture of vehicular rubber tires or other products, or as a factory, mill, shop, processing plant, assembly plant or fabricating plant, but the failure to use and occupy the leased premises as aforesaid shall in no way abate or reduce the rent payable by the Company to the City under the provisions of this lease.

City of Mayfield, Kentucky, Official Statement Relating to the Issuance of $9,500,000 Industrial Building Revenue Bonds Dated April 1, 1959, Contract of Lease and Rent, 19.

141 Cases cited note 59 *supra.* The three leading cases are summarized below. In City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957), the questioned project involved construction of a manufacturing plant to be financed one-half by the city and one-half by the manufacturing corporation. The city's contribution was to be raised by the issuance of general obligation bonds. The city was to hold title to the facility only until the corporation had paid the city the amount of its investment and interest. The city was, therefore, a first mortgagee. The court did not find the facility to be a public one but frankly characterized the plan as one of financial assistance to industry. Industrial financing was then analogized to public construction of port facilities for long-term lease. Since the Maryland credit clause does not limit cities, the court's holding was that the public purpose doctrine had been complied with. There is dictum, however, that the same result would follow under the credit clause.

In Dyche v. City of London, 288 S.W.2d 648 (Ky. 1956), the city proposed to use the proceeds of general obligation bonds for the construction of an industrial facility for lease to industry. The only legislative authority for the program, however, was a broad enabling statute authorizing cities of specified classes, upon finding that it was "necessary to incur any indebtedness," to issue bonds in accordance with the statutory procedure. There was, therefore, no legislative finding of economic justification or express legislative authorization, deemed so important in *Albritton.* The court, however, did impose on the defendant municipality the burden of demonstrating that abnormal unemployment conditions existed in the area. This burden was satisfied, and the bond issue upheld, under the credit clause.

In McConnell v. City of Lebanon, 203 Tenn. 498, 314 S.W.2d 12 (1958), the court upheld, under the public purpose doctrine, a statute modeled closely on the BAWI statute, but lacking the pro forma grant of power for municipal operation which the *Albritton* court deemed so significant. This difference, however, was of no interest to the Tennessee court. The Tennessee Constitution, which allows a loan of credit in aid of a private enterprise upon approval of three-fourths of the voters (art. II, § 29), was complied with. The vote of the electorate, however, did not obviate the need for judicial determination of compliance with the public purpose test.

142 *Cf.* Ferrell v. Doak, 152 Tenn. 88, 92, 275 S.W. 29, 30 (1925).

jects. The lease provision commonly used in Mississippi [143] permits termination only if manufacturing operations are interrupted for a continuous period of one year. Thus, as long as a minimal level of operations is maintained, the termination provision probably would not apply, even though the payrolls being paid would greatly disappoint the community's expectancies. Moreover, in case of default by the lessee, the municipality's power to insure continuing payrolls under the present programs is considerably less than the control exercised by lessor municipalities in the consumer facility cases. Once a transportation, recreational, or parking facility is constructed, the very facts of its existence and municipal ownership carry with them the assurance that the public purpose objectives can be carried out. Regardless of the financial failure of the lessee, the municipality can legally and realistically operate the facility itself or easily obtain a successor lessee. If economic or other changes preclude continued operation on a self-sustaining basis, the facility can be subsidized. In the case of municipally owned industrial plants, however, there is far less certainty that the default of the lessee will not interfere substantially with the continued flow of payroll income. Generally, municipalities lack the legal authority to run industrial plants themselves; [144] and even in Mississippi, where the power exists, its exercise would be completely unrealistic.[145] Municipal operation of manufacturing plants producing for distant markets would be completely out of harmony with American tradition and practices. Accordingly, the only practical municipal alternative in the face of lessee default under industrial financing is to find a successor lessee. Even when economic conditions are favorable, the realities of the industrial real estate market are such that a facility may remain idle for a period of some months before a tenant who wants the particular plant is found; when general economic conditions are unfavorable, several years may elapse before a new tenant is obtained. In addition to the financial loss it causes, a vacant plant within the framework of public industrial financing means a frustration of the public purpose objectives.

Accepted principles of state constitutional law in related areas may by analogy impose a duty upon the BAWI lessee not to unreasonably discriminate in selecting and discharging employees. Under the firm rule of the nineteenth-century cases, otherwise private corporations which may exercise the power of eminent domain or which receive franchises to the use of public streets are under an implied duty to

143 See note 140 *supra.*

144 The BAWI statute is the sole exception to this rule. MISS. CODE ANN. § 8936-09 (Supp. 1960) permits municipal operation conditioned upon state approval.

145 See notes 144 and 137 *supra* and accompanying text. Municipal operation in Mississippi has apparently never been implemented. Letter From Lester G. Franklin, Ass't Attorney General, State of Mississippi, to David E. Pinsky, August 15, 1959.

serve all members of the public without unreasonable distinctions.[146] While all of these cases involved corporations which occupied positions of monopoly or oligopoly, one contemporary treatise writer has treated them as supporting a more general rule applicable to all private enterprises which receive substantial government aid.[147] In the field of industrial financing this rule would impose an obligation upon the lessee not to discriminate unreasonably in selecting and discharging employees. In each case, the corporation should be looked upon as an instrumentality of the financing government for the attainment of specific public purposes—the provision of services to citizens as consumers, and of employment to them as wage earners. In both capacities, the ultimate beneficiaries of the program should be the local citizenry. Discrimination in providing consumer services is basically no different than discrimination in providing employment opportunities.[148] Moreover, beyond state constitutional law, there looms a substantial federal question under the fourteenth amendment.[149]

The contrast between the degree of public control exacted by the consumer facility cases and that required under the Mississippi plan may also be examined in terms of protection of the public financial interest. The pattern of public financing under the BAWI statute, like that in the consumer facility cases, remedies many of the grossest financial abuses of the nineteenth-century railroad-aid bond era. There is adequate public control over the marketing of the municipal bonds, and the plants are constructed by the municipalities or by contractors under their direct supervision. However, available evidence suggests that,

146 See Snell v. Clinton Electric Light Co., 196 Ill. 626, 63 N.E. 1082 (1902); Portland Natural Gas & Oil Co. v. State *ex rel.* Keen, 135 Ind. 54, 34 N.E. 818 (1893); Lumbard v. Stearns, 58 Mass. (4 Cush.) 60 (1849); Haugen v. Albina Light & Water Co., 21 Ore. 411, 28 Pac. 244 (1891).

147 2 MORAWETZ, PRIVATE CORPORATIONS 1075-76 (2d ed. 1886).

148 The rule prohibiting discrimination would probably not apply in any case in which a municipality, owning real property no longer needed for its former public uses, decided to lease it to a private lessee in order to protect the municipality's financial interest. *Cf.* Derrington v. Plumber, 240 F.2d 922, 925 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957); Burton v. Wilmington Parking Authority, 365 U.S. 715, 723 (1961) (dictum).

149 It is now well settled that the lessee of publicly owned property, engaged in selling services to the public, is subject to the limitations of the equal protection clause and may not discriminate in service. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). By analogy, the Mississippi plan lessee may have a constitutional duty not to discriminate in employment. The restaurant and recreation cases are grounded on the proposition that a private party engaged in performing public purpose objectives on publicly owned property is subject to the same duty under the equal protection clause as would be imposed on the public lessor. Industrial lessees under the Mississippi plan are engaged in performing public purpose objectives on publicly owned property. Full analysis of the equal protection clause question, however, would necessitate a discussion of many related problems not germane to the problems of state constitutional law with which this Article is concerned. See Ming v. Horan, 3 Race Rel. L. Rep. 693 (Cal. Super. Ct. 1958); Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

unlike consumer facility projects, municipal control of planning and design in industrial financing is minimal, with much of the responsibility being turned over to the lessee. Where a proposed plant is to be a highly specialized one, built around highly specialized processes, and where the project includes the public financing of equipment,[150] there must inevitably be a virtually complete delegation to the lessee of planning and design. To the extent, therefore, that a project reflects the image of a particularized manufacturing process, the public investment will be jeopardized by private decision making. The admonition of *Walker v. City of Cincinnati*[151] against the union of public and private capital, then, becomes significant. If, however, the needs of the lessee can be fulfilled by a relatively adaptable plant, and if public financing does not include payment for specialized equipment, municipal supervision is more feasible. Although a plant can seldom be fully adaptable, workable distinctions can be made between those plants which are relatively adaptable and those which are relatively specialized. However, only one court has considered the factor of adaptability pertinent.[152]

Another important consideration is the extent to which the municipality's title constitutes a financial safeguard against the risks, inherent in any manufacturing enterprise, which may arise during the term of the lease. Subject to obvious inaccuracies of generalization, business failures may be divided into those caused by internal factors, relating to the quality of management, and those caused by external ones such as changes in technology, demand, competition, and the business cycle. Many business failures, of course, are due to a combination of internal and external factors, as competency in business management includes the ability to forecast basic economic trends and to make intelligent adaptation to change. This internal-external dichotomy, however, will be used for analytical purposes. To the extent that the lessee's default is due to management failures, rather than to external forces, the municipality's title to the plant, insofar as it is adaptable, provides a reasonably good safeguard against substantial loss, although a short period of vacancy may result before the industrial real estate market produces a new tenant. When the default is due to forces affecting the particular industry of the lessee, such as technological

150 The BAWI statute authorizes the financing of equipment. MISS. CODE ANN. §§ 8936-09 (Supp. 1960). The state agency, however, has recently instituted a policy of not permitting the cost of machinery to be included in any bond issue. Letter From W. P. Starnes, Ass't Director, Miss. Agricultural and Industrial Bd., to David E. Pinsky, Dec. 16, 1960. The Tennessee and North Dakota statutes—patterned after the Mississippi plan—do not include machinery. TENN. CODE ANN. § 6-2903 (Supp. 1962); N.D. CENT. CODE ANN. §§ 40-57-02, -19 (Supp. 1961). The revenue bond statutes generally include machinery. *E.g.*, ALA. CODE tit. 37, § 511(20) (1958); KY. REV. STAT. § 103.200 (1959).

151 21 Ohio St. 14 (1871).

152 See City of Oakland v. Williams, 206 Cal. 315, 274 Pac. 328 (1929).

changes or changes in demand patterns, a relatively adaptable plant again provides a reasonably good safeguard. If, however, default is due to broad economic forces producing a national depression, or to long-run forces adversely affecting the economy of the particular section or region where the plant is located, a long period of vacancy or occupancy at a depressed rental may follow, causing serious financial loss to the municipality. This risk, however, unless it is aggravated by the specialized nature of the plant, is analogous to the long-run risk incident in a subway system as discussed earlier. It is proprietary risk, flowing from public decision making—the basic decision to invest public capital in industrial plants.

To the extent, therefore, that it permits financing of nonadaptable industrial projects, the Mississippi plan provides less public control relative to financial risk than consumer facility projects. But even if plants are made adaptable, the BAWI program still fails to meet the test of the *Denver* case and the decisions following it with respect to the adequacy of public control over effectuation of the public purpose objectives.

2. The *Albritton* Rule Contrasted with the Rule of the Port Facility Cases

The limited public control exercisable under the Mississippi plan more closely resembles that which is exerted under judicially approved programs of pier construction for long-term exclusive lease to carriers. In both cases the lessor municipality cannot insure effectuation of the public purpose objectives except to require the lessee to use the facility at some minimal level of activity and for specified purposes only. But even the port facility programs better protect the public financial interest than does the Mississippi plan where the latter finances nonadaptable plants. As with consumer service facilities, the risk to the public financial interest in port facility investments is proprietary.

Port and industrial development perform similar functions in the economy of the financing government. From the standpoint of the port area, it is common to analyze the movement of goods by water as involving two functions, the industrial and the commercial.[153] When the port moves freight originating in or destined for the port area, it functions in its industrial capacity; when, however, it moves through-freight the port performs a commercial function. In its industrial capacity, the port provides an essential service to local industry—transportation of raw materials and finished products—so that government

[153] See BRYAN, PRINCIPLES OF WATER TRANSPORTATION (1939); U.S. COMM'R OF CORPORATIONS, *op. cit supra* note 119, pt. III, at 2.

financing of piers for lease to private parties very closely resembles municipal investment in urban transportation, both being designed to provide an essential local service. However, when the port functions commercially, its activities resemble those of manufacturing industries in terms of the role played in the economy of the area. The municipally owned pier is then providing services for other more distant regions just as the municipally owned industrial plant provides goods for them. The only public service performed by both activities is the generation of additional income for the residents of the port area—both primary payroll income and secondary income—due to the multiplier effect.[154]

Both legal and economic analyses, therefore, underscore a significant similarity between municipal pier and municipal industrial financing. However, there remain significant distinctions between them which cannot be ignored: federal regulatory control over water carriers; less financial risk flowing from private decision making in the case of port facilities; the long asserted preeminent governmental interest in all aspects of port development; and the economic status of port facilities as essential social overhead capital. It follows, therefore, that Mississippi plan industrial financing fails to satisfy the enterprise aid criteria as applied in the port facility cases.

B. Application of the Enterprise Aid Criteria to the Pennsylvania, New England, and Oklahoma Plans

Mortgage plans of industrial financing have a common feature which distinguishes them from the Mississippi plan. The government of the state or municipality does not construct and then lease plants itself. Instead, the government makes or insures mortgage loans to local non-profit development corporations in order to enable the latter to construct industrial facilities for lease or sale to private manufacturers. However, there is also a significant difference among the mortgage plans themselves. The New England and Oklahoma plans, because they pledge the public credit, are prima facie subject to the credit clause. In contrast, the Pennsylvania plan, financed by funds appropriated out of currently levied taxes, is not. The credit clause clearly addresses itself only to incurring debt and not to making appropriations from current revenues.[155] The stock clause is likewise inapplicable to the Pennsylvania plan.[156] The current appropriations

[154] See note 178 *infra* and accompanying text.

[155] See note 76 *supra* and accompanying text.

[156] In several jurisdictions, including Pennsylvania, no current appropriations clause has been adopted limiting state financial action; only the credit and stock clauses apply. See note 91 *supra*. Whenever such a state adopts the Pennsylvania plan, with the credit clause clearly inapplicable, attention is focused on the stock

clause, if adopted, and the public purpose doctrine, therefore, are the only limitations to the Pennsylvania scheme of industrial financing.

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clause. Of course, even if the stock clause is inapplicable, the public purpose test has prima facie applicability. Since the state becomes a creditor rather than a shareholder under the Pennsylvania plan, the stock clause does not have literal application. However, it can be argued that the policy against risking public funds in private undertakings which underlies that limitation calls for its application to the purchase of mortgage bonds as well as stock, even though the public funds are subject to a lesser degree of risk than if they were invested in corporate stock. Once the stock clause is construed to include the purchase of mortgage bonds out of current revenues, it would be incongruous not to extend it to embrace an even more flagrant problem—outright donations to private industry out of current appropriations. The broad question presented is whether the stock clause should be interpreted as coextensive with the current appropriations clause, as well as with the credit clause.

The argument against such broad construction of the stock clause rests upon the nineteenth-century background. Public financial aid to the railroads was effectuated by four common methods—public guaranty of railroad bonds, exchange of public bonds for private bonds, donation of public bonds, and exchange of public bonds for private stock. See notes 72-74 *supra* and accompanying text. The first three techniques amounted to giving or lending of credit and were, therefore, prohibited by the credit clause. But the fourth technique, the purchase of corporate stock financed by borrowing, was the most common technique in many states. It seems reasonably clear that mid-nineteenth-century legislators made a clear distinction between stock subscriptions, even if financed as above, and a loan of credit. Stock subscriptions made the public agency a part owner. The fact that the purchase was financed by borrowing did not convert the transaction into a lending of credit. See Clarke v. City of Rochester, 24 Barb. 446, 484, 489 (N.Y. Sup. Ct. 1857), *aff'd*, 28 N.Y. 605 (1864) (dictum that the credit clause did not prevent the state from being a stockholder in a private corporation); 1 DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF OHIO 523 (1850-51); 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF IOWA 295-97 (1857). The court, as well as counsel, in Walker v. City of Cincinnati, 21 Ohio St. 14, 37, 54 (1871) and the dissenting opinion in Cass v. Dillon, 2 Ohio St. 607, 633 (1853), carefully distinguished between a stock subscription and a loan of credit. Statutes authorizing stock subscription and cases passing on them were careful not to characterize a stock subscription transaction as a loan of credit. An exchange of corporate bonds for public bonds, on the other hand, was so characterized. See City of Aurora v. West, 9 Ind. 74, 75-78 (1857); Commissioners of Leavenworth County v. Miller, 7 Kan. 479, 481-82, 487-88 (1871); Commonwealth *ex rel.* Thomas v. Commissioners of Allegheny County, 32 Pa. 218, 219, 222 (1858); Nichol v. Nashville, 28 Tenn. 251, 253-63 (1848); Pa. Laws 1848, No. 224, § 1, at 273 (all involving stock purchases); Benson v. Mayor of Albany, 24 Barb. 248, 264 (N.Y. Sup. Ct. 1857); Commissioners of Knox County v. Nichols, 14 Ohio St. 260, 266-70 (1863) (involving loans of credit). As the constitutional movement of the nineteenth century reached its culmination, however, there was a tendency to construe stock purchases financed by the issuance of public bonds as within the proscription of the credit clause. See Hill v. Memphis, 134 U.S. 198 (1890); Baltimore & D.P.R.R. v. Pumphrey, 74 Md. 86, 21 Atl. 559 (1891).

That there was a need for a constitutional limitation aimed directly at the stock purchase technique was clear, but the verbal form it should take was not. In large measure, the evil sought to be remedied was not stock purchase per se, but stock purchase financed by the use of public credit. See Garland v. Board of Revenue, 87 Ala. 223, 225, 6 So. 402, 403 (1889); Hagler v. Small, 307 Ill. 460, 468-69, 138 N.E. 849, 852-53 (1923); Hanson v. Vernon, 27 Iowa 28, 33 (1869); Walker v. City of Cincinnati, 21 Ohio St. 14, 53-54 (1871); Cass v. Dillon, 2 Ohio St. 607, 631-32 (1853) (dissenting opinion); 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF IOWA 289-344 (1857); HILLHOUSE, MUNICIPAL BONDS 143-99 (1936). However, the pattern of exchanging corporate stock for public bonds so dominated the day that except in Indiana, see IND. CONST. art. 10, § 6, almost no one gave consideration to the possibility that stock ownership might be financed by other means than borrowing. The clause that emerged, therefore, was a very simple one that purported to cover an area wider than the evil sought to be remedied.

In the light of the above historical background, it is suggested by some that the stock clause be limited to a proscription of stock purchased by the incurring of debt.

In several of the states with which we are concerned—those in which the public aid limitations directed at state action are limited to the credit and stock clauses—

Since state funds under the mortgage plans are loaned to a non-profit development corporation, it might be asserted that no limitations are applicable. Some courts have held that the public aid limitations [157] and the public purpose test [158] do not prohibit public financial aid to certain non-profit organizations.[159] While there is considerable opposing authority in the case of the public aid limitations,[160] it is not necessary to resolve that conflict here, as industrial development corporations are sharply distinguishable from non-profit associations. The latter are generally charitable associations, which operate educational or recreational facilities, such as museums or zoos. In doing so, the non-profit association itself acts as a quasi-public instrumentality for achieving public policy objectives. The same is not true of non-profit development corporations. They are not the primary agents for achieving public objectives, but only serve as conduits through which public funds flow to private manufacturers who ultimately benefit the public.[161] To rely on the non-profit organization feature of the mort-

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the same constitutional conventions which adopted credit and stock clauses limiting the state and municipalities also adopted current appropriations clauses directed solely at municipalities. *Compare* IDAHO CONST. art. 8, § 2, *with id.*, art. 12, § 4; *Compare* PA. CONST. art. 9, § 6, *with id.*, art. 9, § 7. It was clearly recognized that in order to restrict appropriation of public funds from currently levied taxes for use as donations or for the purchase of stocks or bonds, an additional constitutional limitation was necessary. The final decision of the framers to adopt a current appropriations clause, applicable to municipalities, but not to the state, seems to rest on a determination that there was no strong need to so limit state financial action. In this group of jurisdictions, therefore, the argument for limiting the stock clause to the purchase of stock by the incurring of public debt is especially persuasive.

The suggested result is certainly a reasonable one. The incurring of public debt is a substantially greater danger to the taxpayer than an expenditure out of current revenues. It is hardly unreasonable for the constitutional conventions to have acted to prevent the greater evil, while remaining silent on the lesser.

[157] Furlong v. South Park Comm'rs, 340 Ill. 363, 172 N.E. 757 (1930); Hager v. Kentucky Children's Home Soc'y, 119 Ky. 235, 83 S.W. 605 (1904); Johns Hopkins Univ. v. Williams, 199 Md. 382, 86 A.2d 892 (1952); *cf.* McGuire v. City of Cincinnati, 40 N.E.2d 435 (Ohio Ct. App. 1941), *appeal dismissed*, 139 Ohio St. 218, 38 N.E.2d 1023 (1942).

[158] Legat v. Adorno, 138 Conn. 134, 83 A.2d 185 (1951); City of Minneapolis v. Janney, 86 Minn. 111, 90 N.W. 312 (1902).

[159] This is apparently the view of the former Secretary of Commerce of Pennsylvania. See Davlin, *State Development Corporations: The Pennsylvania Experience*, 24 LAW & CONTEMP. PROB. 89, 92-93 (1959).

[160] Fluharty v. Board of County Comm'rs, 29 Idaho 203, 158 Pac. 320 (1916); State *ex rel.* Board of Control v. City of St. Louis, 216 Mo. 47, 89-95, 115 S.W. 534, 546-48 (1909); Johns v. Wadsworth, 80 Wash. 352, 141 Pac. 892 (1914).

[161] The dictum in Wilmington Parking Authority v. Ranken, 34 Del. Ch. 439, 462, 105 A.2d 614, 628 (Sup. Ct. 1954), is particularly pertinent:

> But the prohibition contained in *Art. VIII, Sec. 8 of the Constitution* [the credit, stock, and current appropriations clauses] should not receive too narrow a construction. Clearly, if the public body receiving the appropriation were a mere channel through which public money were to be invested in a private corporation, thus making the City a creditor or stockholder of such a corporation, the transaction would be illegal.

gage plans, therefore, as immunizing them from constitutional scrutiny, is to lean on a slender reed.

The mortgage plans abandon the façade of a publicly owned facility and make apparent the reality of financial assistance. They are, therefore, even less able to satisfy the enterprise aid criteria of the consumer facility cases than the Mississippi plan. Analogizing to FHA program, states and municipalities in their capacities as mortgagees or mortgage insurers can impose restrictions on the use of premises, so as to prevent their conversion to uses less desirable for the local economy,[162] but the feasibility of doing so is limited.[163] Moreover, once a mortgage is satisfied, control over effectuation of the public purpose objectives is at an end.[164]

C. The Public Aid Limitations—Conclusions

The constitutional validity of the tax supported plans, under the criteria applied in the consumer facility cases, is questionable. Municipalities are better immunized against certain types of risk than they were under the nineteenth-century railroad-aid bond plans. Nonetheless, except in the case of a fully adaptable plant, the public assumes a considerable financial risk incident to private decision making; and in all instances inadequate public control is reserved over the effectuation of the public economic objectives. The judicially approved port facility programs more closely resemble the Mississippi plan, but, as already indicated, the two are legally and economically distinguishable.

In applying the enterprise aid criteria, courts have failed to distinguish carefully between the public aid limitations and the public purpose test. This failure is unfortunate and should not become a principle of state constitutional law. Both the public aid limitations and the public purpose test have similar origins, but they are significantly different in form. The public aid limitations were adopted as a specific constitutional response to particular evils which plagued the "take-off" period of the nineteenth century. These limitations, when construed against their historical background, have a specificity

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162 *Cf.* FHA v. Darlington, Inc., 358 U.S. 84 (1958).

163 In view of the unorthodox nature of such restrictions in mortgages, there may be a reluctance on the part of industry to agree to such terms. So far as enforcement is concerned, see note 140 *supra* for discussion of the related problem in the case of the Mississippi plan.

164 The degree of public control which can be exercised to safeguard the public financial interest is reduced, under the mortgage plans, if control over the construction of the facility is delegated to the development corporation. However, this need not be done; the public agency can exercise as close a control over construction as is possible under the Mississippi plan. Of course, under all plans, the degree of control which can be exercised over construction will depend in large part on the extent to which the project involves a specialized plant and equipment rather than an adaptable plant with no public financing of equipment.

rooted in nineteenth-century experience which limits their constitutional elasticity—their capacity to sustain changed interpretation in the light of new conditions. Thus, the tax supported plans not only do violence to the language of the public aid limitations, but to their historical spirit. Fortunately, only two states, Mississippi and Kentucky, have sustained tax supported plans under public aid limitations;[165] the other decisions favorable to tax supported public industrial financing come from jurisdictions in which there is no pertinent public aid limitation.[166] The Mississippi-Kentucky approach is not satisfactory. In the interest of the integrity of our judicial system, specific constitutional limitations deemed obsolete by a subsequent generation should be eliminated by amendment rather than by judicial accommodation. A similar conclusion is suggested with respect to internal improvement clauses.[167]

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[165] Albritton v. City of Winona, 181 Miss. 75, 110-12, 178 So. 799, 809-10, *appeal dismissed*, 303 U.S. 627 (1938); Dyche v. City of London, 288 S.W.2d 648 (Ky. 1956).

[166] Andres v. First Arkansas Dev. Fin. Corp., 230 Ark. 594, 324 S.W.2d 97 (1959), and Halbert v. Helena-West Helena Industrial Dev. Corp., 226 Ark. 620, 291 S.W.2d 802 (1956), both sustained statutes authorizing the state to invest a portion of the surplus in the state treasury in bonds of non-profit development corporations. These corporations were engaged in making mortgage loans to industry. Since the state did not incur debt or contingent debt, the credit clause was deemed inapplicable. The court in *Halbert*, however, invalidated a provision of the same statute which authorized municipalities to purchase membership in a local non-profit industrial development corporation, holding it violative of the constitutional prohibition against any grant of financial aid by municipalities to private enterprises. *Id.* at 625-26, 291 S.W.2d at 806. The Kentucky court upheld the Pennsylvania plan in Industrial Dev. Authority v. Eastern Ky. Regional Planning Comm'n, 332 S.W.2d 274 (Ky. 1960). The current appropriations clause applicable in the state, however, is limited to donations. KY. CONST. § 177. A variant of the Oklahoma plan was upheld in City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957), and the Mississippi plan was sustained in McConnell v. City of Lebanon, 203 Tenn. 498, 314 S.W.2d 12 (1958). Maryland has no credit clause applicable to cities; the Tennessee constitution allows a loan of credit upon approval by three-fourths of the votes cast at an election and this provision was satisfied. TENN. CONST. art. 2, § 29.

[167] For the background of the internal improvement clause, see text accompanying notes 82-84 *supra*. The question presented is whether this limitation should be construed rather narrowly to proscribe only those particular evils in the minds of the nineteenth-century draftsmen—aid to transportation facilities. The answer of the courts has generally been in the negative. Minnesota has invalidated the proposed construction and operation by the state of a grain elevator or warehouse. Rippe v. Becker, 56 Minn. 100, 57 N.W. 331 (1894). Alabama has invalidated state concentration produce markets which would be competitive with private industry. *In re* Opinion of the Justices, 237 Ala. 429, 187 So. 244 (1939). More recently, Wisconsin has held invalid the use of state funds for veterans' housing. State *ex rel.* Martin v. Giessel, 252 Wis. 363, 31 N.W.2d 626 (1948). *But see In re* Opinion of the Justices, 247 Ala. 66, 22 So. 2d 521 (1945); Harrison v. Day, 200 Va. 750, 107 S.E.2d 585 (1959). Underlying these decisions is the conviction that the constitutional intention was to draw a clear line between functions strictly necessary to the exercise of sovereignty, on the one hand, and other functions "which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promotors. . . ." State *ex rel.* Jones v. Froehlich, 115 Wis. 32, 38, 91 N.W. 115, 116-17 (1902). As applied by the courts, therefore, the internal improvement clause has been construed as a vigorous, inflexible version of the public purpose limitation. According to these courts, the internal improvement clause clearly proscribes all industrial financing programs which pledge the state's credit or which

D. The Public Purpose Test—Conclusions

The public purpose test emerged as a response to the same problems which led to the adoption of the public aid limitations. But the nineteenth-century cases which approved nondonative railroad-aid bonds, indicate that its highly generalized verbal anatomy has the same elasticity as do the concepts due process and equal protection under the federal constitution. Judge Learned Hand's description of the first, fifth, and fourteenth amendments may aptly be applied to the public purpose doctrine—it is "cast . . . in such sweeping terms that [its] . . . history does not elucidate [its] . . . contents." [168]

Since the meaning of this limitation has the capacity to change with the times, pertinent factors must be judicially determined to direct the nature and course of its evolution. It is significant that the decision in *Loan Ass'n v. Topeka* [169] in 1875, invalidating industrial aid bonds under the public purpose test, coincided with the beginning of an important transformation in the United States Supreme Court's philosophy of judicial review.[170] In the 1870's and 1880's the Court began to abandon in practice its pre-Civil War attitude of self-restraint. While it continued to reiterate the principle that any rational doubt was to be resolved in favor of contested statutes, the Court passed upon economic regulatory legislation as would a policy making body. This philosophy has, of course, now been replaced by one of rigorous self-restraint and liberality, permitting maximum legislative economic experimentation. Economic legislation will not be disturbed unless the challenger overcomes a presumption of constitutionality by demonstrating that the statute "is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." [171]

The approach of the Supreme Court is destined to exert a profound impact on the development of the public purpose test in state courts. Economic regulatory and national security legislation may impinge upon one relatively small economic, social, or political group contrary to the mandates of the first, fifth, or fourteenth amendments. On

use current appropriations from the state treasury. While this type of inflexible constitutional limitation may be regretted as a matter of policy, the interpretation is the one most in harmony with nineteenth-century constitutional history. As in the case of the public aid limitations, constitutional amendment should be looked to as the appropriate route for change.

[168] HAND, THE BILL OF RIGHTS 30 (1958).

[169] 87 U.S. (20 Wall.) 655, 661-67 (1875).

[170] See Barnett, *Constitutional Interpretation and Judicial Self-Restraint*, 39 MICH. L. REV. 213, 232-37 (1940).

[171] United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); see Carolene Prods. Co. v. United States, 323 U.S. 18, 31-32 (1944); AFL v. American Sash & Door Co., 335 U.S. 538, 543-44, 555-57 (1949) (concurring opinion).

review, courts assume that the political processes may be inadequate to protect them. In contrast, programs of public spending do not require sacrifice from any one group, but from all taxpayers in accordance with existing patterns of taxation. There is, therefore, more reason for courts to assume that the normal political processes will be adequate to protect the public.[172] While conflicts between economic groups are very much in evidence during the drafting of tax legislation, the resolution of these differences must necessarily be left to the poltical arena, subject to federal and state constitutional limitations on the taxing power.

The danger that judicial scrutiny of constitutionality may degenerate into policy review by a super-legislature is present with greater force in the case of public spending than regulatory enactments. In passing upon regulatory legislation, courts can at least attempt to balance the public benefits to be attained against the private sacrifices called for. As difficult as the judicial task may be in these cases, it would be considerably more difficult to develop meaningful standards by which to review an appropriation or bond issue for industrial financing purposes which represented an average tax burden of only a few dollars a year. There is good reason to consider the public purpose issue as approaching the political question limit.

A countervailing consideration, however, must be weighed. Implicit in the philosophy of rigorous judicial self-restraint, at least where no problem of federalism is present, is the assumption that a reasonably healthy legislative institution exists. Unfortunately this is not the fact in most states. As Dean Fordham has recently pointed out, state legislatures are underdeveloped in power, structure, and procedure.[173] The typical legislature meets only in short biennial sessions; its powers are sharply limited by detailed restrictions which interfere with a healthy exercise of independent judgment; and its members are generally poorly paid and without professional staffs. The capacity to make intelligent and independent policy decisions depends in good part on thorough committee work, but the weakness of the committee system in state legislatures is pitiful. Unless significant reforms are carried out, state courts may well be reluctant to give the same degree of deference to local legislative judgment as the Supreme Court gives to congressional decisions.

Although the condition of the state legislative institution militates against judicial self-restraint, the time is ripe for the public purpose

172 Today, unlike the nineteenth century, the mass media and numerous civically oriented citizens groups play an important role in informing taxpayers of the issues involved in taxation and spending questions.

173 See FORDHAM, THE STATE LEGISLATIVE INSTITUTION 11-76 (1959).

doctrine to tear itself away from strict adherence to the enterprise aid criteria as applied in the consumer facility cases and to evolve independently as a more relaxed limitation on state and municipal financial action. Encouragingly, modern industrial financing cases reflect, to a considerable extent, a movement in this direction.[174]

This conclusion, however, does not carry with it any imperatives as to the content of the new standard. At least two possibilities exist. One course is to adopt the Supreme Court's "rational basis" standard of review in economic regulatory matters. A persuasive policy argument can, of course, be made against financing industrial projects by issuance of general obligation bonds. The public assumes the risk of economic loss without any offsetting guarantee that its objectives will be attained. Moreover, it has been forcefully asserted that it is much sounder in competing for industry to expend limited municipal resources to improve educational, recreational, street, and other traditionally public facilities than to finance manufacturing plants.[175] But under the rational basis test these views do not assume constitutional dimension.

Economic considerations do furnish a rational basis for legislative determinations to finance industrial development. The urgent economic need to alleviate unemployment and to raise standards of living, and the curtailment of nongovernmental investment in manufacturing plants, provide good reason for using public capital,[176] and courts have in fact been influenced by these considerations.[177]

Increased knowledge of area economics, particularly of the importance of the local multiplier concept, further supports the legislative determination that has been made. Under the local multiplier concept the productive activity of a community is divided into two types, basic and derivative.[178] Basic activity produces an inflow of income from

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174 See note 166 *supra* and accompanying text.

175 See GILMORE, DEVELOPING THE "LITTLE ECONOMIES" 62 (Comm. on Economic Development Supp. Paper No. 10, 1959); INTERNATIONAL CITY MANAGERS' ASS'N, MANAGEMENT INFORMATION SERVICE, THE CITY'S ROLE IN ECONOMIC DEVELOPMENT (Rep. No. 177, 1958); UNIV. OF ALABAMA, LOCAL GOVERNMENT SERVICES AND INDUSTRIAL DEVELOPMENT IN THE SOUTHEAST (1952); *Laws and Attitudes in the Industrial Development of the South*, 2 J. PUB. L. 63, 85-6 (1953). See also the clear emphasis on factors other than industrial financing in COMM. ON INDUSTRIAL DEVELOPMENT, REPORT TO THE SOUTHERN GOVERNORS' CONFERENCE (1961).

176 See notes 40-46 *supra* and accompanying text. In making federal funds available for industrial financing under the Area Redevelopment Act, Congress has recognized and in effect approved state and municipal industrial financing activities. 75 Stat. 51 (1961), 42 U.S.C.A. § 2505(b)(9)(B) (Supp. 1961).

177 See notes 64-65 *supra* and accompanying text.

178 See WEIMER & HOYT, PRINCIPLES OF REAL ESTATE 319-60 (3d ed. 1954); UNIV. OF NEBRASKA COLLEGE OF BUSINESS ADMINISTRATION, THE COMMUNITY ECONOMIC BASE AND MULTIPLIER (1958); Andrews, *Mechanics of the Urban Economic Base*, 29 LAND ECON. 161 (1953). While the multiplier concept seems elementary, only in the last three or four decades has it been articulated in formal terms and applied to various communities in field studies.

the export of goods to other areas or the purchase of goods and services in the area by tourists. Derivative activity, on the other hand, produces a net flow of income away from the area. Manufacturing is a principal form of basic activity. The essence of the multiplier concept is that every increment of investment in a basic activity has a leverage effect, increasing or decreasing employment and payrolls in the basic sector. The volume of derivative activity will vary accordingly. The local multiplier is determined by dividing basic employment into total employment. When a state industrial financing program successfully attracts a manufacturing industry, the ensuing economic gain to the community is measured not only by the company's payroll but also by the amount of secondary income induced by it, which will vary from area to area depending upon the local multiplier. The concern expressed by the Supreme Court in *Loan Ass'n v. Topeka*[179] that public financial assistance to manufacturing must ineluctably lead to similar programs to assist "the merchant, the mechanic, [and] the innkeeper," therefore, proves to be unwarranted. A reasonable line can be drawn between basic and derivative activities and public industrial financing confined to the former.[180] The argument for sustaining industrial financing legislation under the rational basis standard is, accordingly, persuasive.

Due to the close historical relationship between the public purpose doctrine and the public aid limitations, and to the weakness of the state legislative institution, some courts may be reluctant to apply the rational basis test to industrial financing legislation. They may prefer to apply a modified enterprise aid standard of review, which departs less decisively from the criteria applied in the consumer facility cases. Under this standard, the enterprise aid criteria would be used as a framework for reasoned anlysis rather than as strict requirements; the urgency of the need for public financing would be given greater weight and the public control requirement relaxed. Courts could demand only that degree of public control which is realistically possible. Prohibitions against unreasonable discrimination in employment, for example, are economically feasible and might well be required. The lease provision currently used in Mississippi, prohibiting conversion of the plant to a nonmanufacturing use, is also practical. Although payroll controls are probably not possible, municipalities can better control the effectuation of economic objectives and safeguard the public financial interest by bringing the process of project selection under more intelligent public direction. The courts can insist that statutes require pub-

179 87 U.S. (20 Wall.) 655, 665 (1875).

180 The industrial financing programs have generally observed this line in practice. See notes 47-49 *supra* and accompanying text.

lic industrial financing to be carried on only in a context of comprehensive local economic planning.

Compliance with the modified enterprise aid standard would call for municipal preparation of an economic base study, in which all the facts necessary to an understanding of the area's economy are assembled and organized.[181] A development plan, containing area goals, should then be formulated, in accordance with the base study. The broad economic goals of all areas are to a considerable extent identical. They are directed toward a viable economy, customarily described in terms of stability, balance, and worker productivity.[182] These goals, however, are only meaningful if related to the resources and skills which the particular locality currently possesses, and to its potentialities for future development.[183] An economic development plan should include, as an integral component, plans for public and private action to improve the quality and quantity of services upon which industry is generally dependent—water, electricity, gas, and industrial waste disposal—together with plans to expand the community's facilities to technically train workers.[184] The evidence is persuasive that industries, in deciding on plant location, give substantial weight to all aspects of community life—health and recreational facilities, the educational system, the local transit system, housing, and the quality of local government.[185] A comprehensive economic development plan must incorporate a master program for the community's development in these fields. Once the

[181] The discussion of economic base studies and economic development plans is based on CHAPIN, URBAN LAND USE PLANNING 117-28 (1957); HERRING, SOUTHERN INDUSTRY AND REGIONAL DEVELOPMENT 1-8 (1940); URBAN LAND INSTITUTE, PREPARING YOUR CITY FOR THE FUTURE—HOW TO MAKE AN ECONOMIC STUDY OF YOUR COMMUNITY (Tech. Bull. No. 29, 1956); INTERNATIONAL CITY MANAGERS' ASS'N, MANAGEMENT INFORMATION SERVICE, THE CITY'S ROLE IN ECONOMIC DEVELOPMENT (Rep. No. 177, 1958).

[182] Stability refers to the capacity of the economy or of an industry to withstand fluctuations in the business cycle and to minimize seasonal business variations. Balance refers to diversification of productive activity in an economy which requires a wide range in the type of economic activity including manufacturing, trade, construction, finance, and government, as well as variety within the all-important manufacturing category itself. Productivity refers to the goal of a high value added by the manufacturer per wage earner reflecting itself in a high wage rate. See CHAPIN, *op. cit. supra* note 181.

[183] Two of the goals articulated in a recent economic base study of an area in western Pennsylvania were to attract industries using semi-finished steel as a raw material and those employing female labor. PENNSYLVANIA ECONOMY LEAGUE, AN ECONOMIC BASE SURVEY OF THE SHENANGO VALLEY AREA AND MERCER COUNTY 26-30 (1956).

[184] See UNIV. OF ALABAMA, LOCAL GOVERNMENT SERVICES AND INDUSTRIAL DEVELOPMENT IN THE SOUTHEAST (1952) and other authorities cited note 175 *supra*. The significance of the factors mentioned is underscored by the recently enacted Federal Area Redevelopment Act which places major emphasis on loans and grants for public facilities which "will tend to improve the opportunities . . . for the successful establishment or expansion of industrial or commercial plants . . ." and financial assistance to promote the occupational training and retraining of unemployed and underemployed persons. 75 Stat. 52-3, 58-60 (1961), 42 U.S.C.A. §§ 2506-07, 2513-14 (Supp. 1961).

[185] See authorities cited note 175 *supra*.

master plan is prepared, each industrial financing project should be certified by appropriate state or local officials as in conformance with it to the extent that such conformance is realistically possible.[186]

This recommendation is by no means novel.[187] But it could be argued that it does not rise to constitutional dimension. No court has held that the constitutionality of industrial financing legislation depends upon conformity to an economic development plan.[188] One court has invalidated legislation even though it did so.[189] We have already noted, however, the emphasis in the port facility cases on comprehensive planning for the development of the port.[190] In urban land use planning as well, one of the principal themes is that the legality of a single act may well depend upon its relationship to a well considered master plan. Taking by eminent domain of unblighted as well as blighted properties under urban renewal legislation is constitutionally justified under the public use limitation because the taking is integrated

[186] In making this certification as to whether the proposed industrial financing project is in conformance with an overall economic development plan, the approving officials should in addition consider the plant adaptability. See notes 150-52 *supra* and accompanying text. While the failure of the plan to provide for an adaptable plant or its inclusion of equipment financing should not make the project unacceptable *per se*, this should be one factor to be weighed.

In order to preclude frustration of the plan by subsequent action of the industry in shifting the use of the plant to some less desirable use, it may be necessary to incorporate use restrictions in the lease or mortgage. However, radical shifts in the use of a facility will often be the product of adverse economic conditions, and covenants limiting use would, under these circumstances, become realistically unenforceable. See note 140 *supra*.

[187] Legislation in Washington authorizes the creation of port districts with authority to take so-called marginal lands by eminent domain, to develop them for port and industrial purposes pursuant to a comprehensive plan, and to levy a tax for these purposes. WASH. REV. CODE §§ 53.25.020-.900, 53.36.100 (Supp. 1959). Despite the requirement of a compresensive plan, the statute was held invalid as authorizing a taking for a private purpose. Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959). The Federal Area Redevelopment Act requires a comprehensive economic plan as a requisite for eligibility. 75 Stat. 50 (1961), 42 U.S.C.A. § 2505(b)(10) (Supp. 1961). Analogous provisions are found in the Housing Act of 1954, 68 Stat. 623, 625, 626, *as amended*, 42 U.S.C.A. §§ 1451(c), 1455(a), 1460(b) (Supp. 1961).

[188] *But cf.* Opinion of the Justices, 99 N.H. 528, 114 A.2d 514 (1955). The court was asked for an advisory opinion on the validity of proposed legislation creating an authority with power to develop real property for industrial parks, including power to construct industrial plants. The state treasurer was authorized to purchase the authority's notes. The court ruled that the proposed statute would be invalid because it failed to set forth standards guiding the authority in its determination that a proposed project would serve a public purpose and because it did not require the agency to make a formal finding of public purpose, preferably after a public hearing. While the approach of the New Hampshire court and the view espoused here are certainly distinguishable, they are related by a common concern with the need for additional safeguards after the legislature has determined that industrial financing is for a public purpose. The New Hampshire court resolved its concern by a traditional approach—legislative standards and a hearing. This approach, however, is of limited practicality in industrial financing, where legislative standards must necessarily be even more general in nature than usual. To require the appropriate officers to engage in comprehensive economic planning, however, and to relate each project to such a plan is feasible and in general harmony with precedent in related areas of public law.

[189] Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959).

[190] See note 129 *supra* and accompanying text.

with a rational plan for area renewal.[191] Conformance with an overall plan normally is statutorily required in zoning.[192] To the extent that the requirement approaches a test of reasonableness, the statutory provision imposes a constitutional due process standard.[193] If an economic base plan is required, the general taxpayer will be protected against arbitrary action somewhat in the manner of an owner of real property affected by zoning and eminent domain.

None of the current tax supported plans satisfies the modified enterprise aid standard. Their defects, however, can easily be remedied by legislation. Whether a given state adopts the rational basis test or the modified enterprise aid standard, or continues to adhere strictly to the original enterprise aid requirements, will depend not only on the factors discussed in this section but on the intensity of the economic need for public financing.[194] The type of plan before the court may also be significant. A reasonable line can be drawn between the Pennsylvania plan, which rests on current appropriations, and those plans which rest upon general obligation debt or public guarantees of credit. Because the latter obligate the community, including future taxpayers unrepresented in the legislature, for a generation or more, a stricter standard of judicial review may be applied to them. The Pennsylvania plan might be judged by the rational basis standard, while the other tax supported plans are required to comply with the modified enterprise aid standard.

E. Credit Clause Directed at the State—Applicability to Municipalities

Several states have adopted, in addition to the other public aid limitations, a credit clause which is directed in express terms only at the state.[195] This limitation should not be construed to embrace political subdivisions, unless it is a fundamental statement of public policy. The majority of courts have adopted the narrower view that it applies only to the state.[196] This result is more consistent with the intention of the adopting conventions. There is no evidence that the public aid limitation provisions were the result of sloppy draftsmanship

191 See Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 104 A.2d 365 (1954).

192 The majority of state enabling acts follow closely the Standard State Zoning Enabling Act of the Department of Commerce. Section 3 contains the "comprehensive plan" requirement. U.S. DEP'T OF COMMERCE, SURVEY OF ZONING LAWS AND ORDINANCES 10 (1928), reprinted in 2 RATHKOPF, THE LAW OF ZONING AND PLANNING 877-82 (3d ed. 1960).

193 See Haar, *"In Accordance With a Comprehensive Plan,"* 68 HARV. L. REV. 1154, 1170-75 (1955).

194 See notes 64-66 *supra* and accompanying text.

195 *E.g.*, ME. CONST. art. 9, § 14. See generally note 91 *supra* and accompanying text.

196 See authorities cited note 69 *supra*. *Contra*, State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957); OPS. IOWA ATT'Y GEN. 80 (1938); SECRIST, AN ECONOMIC ANALYSIS OF THE CONSTITUTIONAL RESTRICTIONS UPON PUBLIC INDEBTEDNESS IN THE UNITED STATES 63-64 (1914).

rather than of careful consideration; indeed, the evidence is to the contrary. In Iowa, for example, the constitutional convention of 1857 gave lengthy consideration to the merits of imposing public aid limitations on cities and counties, and to the interrelationships between such limitations and similar limitations on the state.[197] The constitution which was finally adopted had a credit and stock clause directed only at the state; and it would be difficult to conclude that this was not the result of deliberate choice. In addition, state constitutions generally differentiate in all financial areas between provisions applicable to the state and those applicable to political subdivisions. The lending of credit should be no exception. To apply the credit clause to the state but not to its political subdivisions is not unreasonable. The problem of excessive state debt may well be more serious than that of municipal debt. Also, a constitution may reasonably permit local experimentation in aiding economic development while restricting the state from doing the same thing.

VI. The Revenue Bond Plan

The revenue bond plan is a type of municipal industrial financing only in a limited sense. Because the public credit is not pledged, the bondholders must look for repayment to a special fund fed solely by rental revenues. In the typical revenue bond project, the municipality agrees to construct and equip a manufacturing plant in accordance with plans and specifications approved by a private corporation and then lease it to the corporation for a term of twenty to twenty-five years. A rental is fixed which will amortize the bonded indebtedness and pay the interest charges during the term of the lease. The agreement usually is a net lease, under which the lessee is obligated to maintain the premises and to pay all insurance premiums. Both the facility and the bonds are tax exempt.[198] At the close of the primary term, the lessee usually has an option to extend at a nominal rent, often by successive short-term renewals. In many instances the lessee has an assured occupancy for a total period of fifty to sixty years. The lease usually can be freely assigned or the premises sublet without the consent of the municipality. It is also common for the lessee to be granted an option to purchase during the primary term by satisfying the municipality's debt and interest charges, or after the close of the primary term, by paying a nominal sum.[199] Although the city, therefore, holds title to the land and facility, the corporation is

197 1 Debates of the Constitutional Convention of Iowa 289-344 (1857).

198 See notes 224-28 *infra* and accompanying text.

199 This description of a typical revenue bond plan is based on Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952); Bennett v. City of Mayfield, 323

guaranteed the right to use the facility for virtually all of the useful life, so long as it pays the principal debt and interest, discharges its duties to maintain the facility, and keeps it properly insured.

The Kentucky court has aptly characterized the municipality's role as that of a trustee.[200] More precisely, it can be analogized to a trustee under a mortgage deed of trust. The municipality, like the mortgage trustee,[201] is basically a conduit for funds flowing between the user of the facility and the bondholders. It even assumes certain duties similar to those of the trustee,[202] including the handling of the revenues and the preservation and enforcement of the lease.[203] The differences between the mortgage trustee and the municipal issuer of industrial revenue bonds are relatively slight. While the mortgage trustee does not hold legal title,[204] the municipality does. The mortgage trustee also has no equity in the property, but the municipality has a proprietor's right to possession if the lessee fails to exercise any of its options to extend the term or to purchase.[205] Opportunity to exercise these rights, however, will be unlikely to occur if the facility has any market value. Even if the lessee no longer needs the plant

S.W.2d 573 (Ky. 1959); Faulconer v. City of Danville, 313 Ky. 468, 232 S.W.2d 80 (1950); Village of Deming v. Hosdreg Co., 62 N.M. 18, 36-37, 303 P.2d 920, 932 (1956) (dissenting opinion); Darnell v. County of Montgomery, 202 Tenn. 560, 308 S.W.2d 373 (1957); ALABAMA STATE PLANNING AND INDUSTRIAL DEV. BD., THE PROCEDURE FOR ISSUING INDUSTRIAL DEVELOPMENT BONDS BY MUNICIPALITIES 24-27 (Reprint 1959); City of Mayfield, Kentucky, Official Statement Relating to the Issuance of $9,500,000 Industrial Building Revenue Bonds Dated April 1, 1959, at 29; City of Scottsville, Kentucky, Official Statement Relating to $850,000 Industrial Building Revenue Bonds Dated June 1, 1960, at 23-24. The picture presented is a typical or composite one. There are, of course, variations. The power of Alabama municipalities to grant purchase options is qualified by opinions of the Attorney General's ruling that the option is valid under the credit clause only if based upon more than nominal consideration. Ops. Ala. Att'y Gen. to Hon. Pleas Looney, Director, Alabama Planning and Industrial Dev. Bd., May 6, May 16, & Aug. 5, 1957.

200 Bennett v. City of Mayfield, 323 S.W.2d 573, 576 (Ky. 1959); Faulconer v. City of Danville, 313 Ky. 468, 474, 232 S.W.2d 80, 84 (1950).

201 For a discussion of the functions and duties of the trustee under the mortgage deed of trust, see 1 GLENN, MORTGAGES §§ 20-21.3 (1943).

202 The fact that commercial trustees are sometimes designated to perform these functions, as well as the usual duties of a mortgage trustee upon default, does not detract from this analysis. In such cases, the municipal trustee has merely delegated some of its duties.

203 Compare the analysis of public building authorities by Professor Morris. A building authority constructs a public building, finances it by the issuance of its bonds, and then leases it to a traditional unit of government. Since the authority has no other unpledged income, the bondholders rely exclusively on the rental income received by the authority. Under Professor Morris' analysis, the building authority, realistically a conduit of funds, can be looked upon as a trustee under a mortgage deed of trust and the lessee government is realistically the debtor. Morris, *Evading Debt Limitations With Public Building Authorities: The Costly Subversion of State Constitutions*, 68 YALE L.J. 234, 243-50 (1958).

204 GLENN, *op. cit. supra* note 201, § 20, at 127-29.

205 The municipality will, of course, take possession upon lessee's default. But in that case, it will be under a duty to the bondholders to re-lease upon terms similar to those in the prior lease.

for its own business, it can avail itself of the usually unrestricted right to assign or sublease.

The majority of decisions have sustained the validity of the revenue bond plans under the public aid limitations and the public purpose test. The courts have held that a statute which pledges only project revenues does not pledge the public credit, and therefore does not lend the public credit in aid of anyone.[206] The public purpose test and the public aid limitations have been identically treated. Of the four courts that invalidated revenue bond statutes, two relied on both the credit clause and public purpose test,[207] one on the credit clause alone,[208] and one on the public purpose test alone.[209]

These minority courts[210] and law review commentators[211] have asserted that several factors justify the invalidation of revenue bond statutes under the credit clause and the public purpose test. Public officers who administer the plans must perform various duties similar to those of the mortgage trustee, including fixing and collecting rentals and providing insurance coverage. It is alleged that it is improper for them to be so occupied. If so, taxpayers have a valid interest in the proper use of officers' time. Further, the use of officers' time can be translated into an expenditure of public funds—a given percentage of their salaries. In addition, improper performance of their duties by municipal officers may create municipal liability to bondholders or others. Even if that does not occur, a default by the lessee might produce a default on the bonds which would adversely affect the city's credit status.

It is important to determine how significant these arguments are to the application of the credit clause. The first factor, officer time and its financial component is *de minimis*. When due deference is given to the legislative judgment, the application of either the credit clause or the current appropriations clause for this reason is weak indeed.

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206 See cases cited note 63 *supra* under the heading "Plans upheld."

207 State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957); State v. Town of North Miami, 59 So. 2d 779 (Fla. 1952).

208 Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960).

209 McClelland v. Mayor of Wilmington, 159 A.2d 596 (Del. Ch. 1960). Although the Delaware Constitution contains a credit clause applicable to municipalities, article 8, section 8, the court did not rely upon it.

210 See cases cited note 63 *supra* under the heading "Plans held invalid"; Village of Deming v. Hosdreg Co., 62 N.M. 18, 37, 303 P.2d 920, 932-33 (1956) (dissenting opinion).

211 Virtue, *The Public Use of Private Capital: A Discussion of Problems Related to Municipal Bond Financing*, 35 VA. L. REV. 285, 294-95, 306-07 (1949); Note, *Incentives to Industrial Relocation: The Municipal Industrial Bond Plans*, 66 HARV. L. REV. 898, 902 (1953); Note, *The "Public Purpose" of Municipal Financing For Industrial Development*, 70 YALE L.J. 789, 792-93 (1961).

The second danger, potential municipal liability flowing from improper performance of official duties, presents a more serious problem. A considerable number of courts, dealing with special fund-special assessment bonds, have imposed liability on the municipality for failure to levy adequate assessments [212] and for misappropriation of moneys collected,[213] either on a theory of implied contract [214] or of negligence.[215] There is some indication that similar rules would be applied in the case of revenue bonds.[216] Most of the revenue bond statutes in the field of industrial financing, however, contain exculpatory clauses, drafted as strongly and precisely as possible to immunize the municipality from such liability.[217] The effect which courts will give them is still uncertain.

Nonetheless, even if these clauses are liberally construed, municipal activity in connection with an industrial financing project, like any municipal activity, creates an ever present potential for tort or contract liability to persons other than bondholders, a type of liability which seems to be outside the scope of the exculpatory clauses.[218] On balance, however, the risk presented by potential tort or contract liability is quite small.

In any case, the possibility of municipal liability does not necessarily bring the issuance of revenue bonds within the credit clause. The trustee under a mortgage deed of trust is not regarded as pledging his own credit because the courts can impose liability for breach of his duties. To hold the credit clause applicable because of the possibility of tort liability runs counter to the closely related line of cases holding that special assessment bonds, payable from a special fund, and revenue bonds are not debt for the purpose of state constitutional debt limitations—notwithstanding the possibility of tort liability.[219] If no debt is

[212] See 15 McQUILLIN, MUNICIPAL CORPORATIONS §§ 43.136, 43.161 (3d ed. 1950); Note, *Municipal Liability Upon Improvement Bonds*, 44 HARV. L. REV. 610, 613 (1931).

[213] *E.g.*, Rothschild v. Village of Calumet Park, 350 Ill. 330, 183 N.E. 337 (1932).

[214] *E.g.*, Nagle Engine & Boiler Works v. City of Erie, 350 Pa. 158, 38 A.2d 225 (1944).

[215] *E.g.*, City of Mankato v. Barber Asphalt Paving Co., 142 Fed. 329, 334, 346-48 (8th Cir. 1905).

[216] Getz v. City of Harvey, 118 F.2d 817 (7th Cir. 1941), *cert. denied*, 314 U.S. 628 (1941); *cf.* RFC v. Municipal Bldg. Corp., 63 F. Supp. 587 (D. Me. 1945); Public Market Co. v. City of Portland, 171 Ore. 522, 587-90, 130 P.2d 624, 649-51 (1942). *Contra*, Oppenheim v. City of Florence, 229 Ala. 50, 155 So. 859 (1934) (dictum).

[217] *E.g.*, ALA. CODE tit. 37, §§ 511(23)-(24) (1958).

[218] See Oppenheim v. City of Florence, 229 Ala. 50, 56, 155 So. 859, 864 (1934) (dictum); Springfield Tobacco Redryers Corp. v. City of Springfield, 41 Tenn. App. 254, 293 S.W.2d 189 (1956).

[219] City of Mankato v. Barber Asphalt Paving Co., 142 Fed. 329, 346-48 (8th Cir. 1905); Indiana Harbor Belt R.R. v. City of Calumet, 391 Ill. 280, 294-98, 63 N.E.2d 369, 375-77 (1945); see 15 McQUILLIN, MUNICIPAL CORPORATIONS §§ 41.31-.32 (3d ed. 1950).

created, logically there is no lending of public credit. Application of the credit clause to the revenue bond plans inhibits experimental economic legislation by unreasonably stretching the clause to cover potential evils not within its spirit and never contemplated by the framers of the limitation.

The third factor—possible adverse effect of a default on the city's credit—perhaps comes closest to the rationale of the public aid limitations. If this should materialize, the municipal officers would be faced with a number of unhappy choices, all of which would impinge directly on the taxpayer: assuming the debt as a moral obligation; refunding at a higher interest rate; financing future capital improvements out of current taxation; or cancelling planned improvements. Whether default on industrial revenue bonds would adversely affect a municipality's credit standing and, if so, to what extent, are questions that require delicate prediction based upon technical expertise. Unfortunately, those who have concluded that the danger is realistic have done so on the basis of informed speculation only.[220] To rebut the presumption of constitutionality, those who attack revenue bond industrial financing legislation should support their position by reliable testimony from investment bankers.[221] Only when the probability of damage to the municipality's credit rating is properly established on the record, should courts face the question of how much weight should be accorded this factor. In any event, it would be necessary to overrule or distinguish the cases which have upheld special fund obligations under debt limitations. Such overruling would effectively strike down all special fund financing; but the doctrine of these cases is too entrenched to render this an actual possibility. Yet to distinguish them away is also difficult, for both constitutional debt limitations and credit clauses were intended to protect taxpayers from heavy future taxes levied to pay for recklessly incurred past debt, a danger plainly not present with revenue bonds. While damage to credit standing is a related evil, it is of a lesser magnitude. Due deference to the legislative judgment again dictates not a broad interpretation of the credit clause that would prohibit

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220 See Bessemer Inv. Co. v. City of Chester, 113 F.2d 571, 574 (3d Cir. 1940); Harbold v. City of Reading, 355 Pa. 253, 257-58, 49 A.2d 817, 820 (1946).

221 The expectancy that the municipality will support bonds out of general funds to prevent a default may be greater in the case of special assessment bonds and non-industrial revenue bonds than revenue bonds. They are issued for improvements which have traditionally been deemed public in nature and are at the vital core of community life. In contrast, any perceptive investor purchasing industrial development revenue bonds would rely exclusively on the general credit of the lessee corporation.

legislative pioneering, but a relatively strict interpretation which would limit the credit clause to what is conventionally regarded as debt. The credit clause should not, therefore, be a bar to revenue bond plans.

The validity of these plans under the public purpose test follows a fortiori. The rationale of the judicial restraint espoused earlier in connection with the public purpose test as applied to tax supported plans leads logically to an even more limited concept of review of revenue bond programs. The modified enterprise aid standard is only justified by the need to protect present and future taxpayers against the serious tax burden flowing from recklessly incurred debt. Except to the extent that credit standing is impaired, this consideration is irrelevant to revenue bond financing. Just as Pennsylvania plan financing calls for less judicial scrutiny than plans which incur general obligation debt, so revenue bond plans call for an even more relaxed standard of judicial review. Judicial examination of revenue bond industrial financing legislation should be limited to a determination of whether the statute rests upon a rational basis within the knowledge and experience of the legislators.

As in the case of the tax supported plans, the rational basis which supports the revenue bond plan is the urgent need for more community income and the lack of private financing for industrial expansion. However, the revenue bond plans do not, in actual operation, provide public financing; the municipality, as "trustee," merely facilitates private borrowing by "lending" the lessee its federal tax exemption on municipal bond income and its state property tax exemption. State courts need not determine whether this use—or misuse—of tax exemptions is reasonable.[222] To do so would be to enter a "political thicket" which should be avoided. The question of exploitation of the tax exemptions can more appropriately be left to Congress, the Supreme Court, and the state legislatures.[223] With this troublesome problem removed from consideration, the only question before a state court is whether there is a rational nexus between the economic need which cannot be met by private financing, and the use of revenue bond financing. The responsive analysis is the same as in the case of the tax supported plans; again, the argument for not disturbing the legislative judgment calls for the use of the rational basis standard.

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222 See note 53 *supra* and accompanying text.

223 Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 586 (1895), held that Congress could not constitutionally levy a tax on the income from state or municipal bonds. More recent decisions in Alabama v. King & Boozer, 314 U.S. 1 (1941), Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 486 (1939), and Helvering v. Gerhardt, 304 U.S. 405 (1938) cast doubt on the continuing validity of *Pollock*.

VII. State Tax Exemption Under the Mississippi and Revenue Bond Plans

The Mississippi and revenue bond plan statutes are generally silent on the question of tax exemption for the financed industrial facility.[224] In states where the Mississippi plan rests upon constitutional amendment, the amendments are also silent on this point. As a matter of practice, however, these facilities have been treated as exempt,[225] and the one court which has faced the question has upheld exemption.[226] In contrast, the statutes generally expressly exempt the bonds issued to finance the project,[227] but tax exemption for revenue bonds has been held invalid under the uniformity clause by the one court to which the question was presented.[228]

In many states, the constitution—in some states as a mandatory provision,[229] and in others as a grant of authority to the legislature[230] —exempts municipal property used for public purposes from taxation. Even in the absence of such a provision, courts have reached the same result.[231] The exemption will be referred to as the public purpose exemption. Under the public purpose exemption, the validity of an industrial financing program does not imply a tax exemption, as "public purpose" need not have the same meaning when used as a limitation on public expenditures as it does when used as a restriction on tax exemption.[232]

In some other states the constitutions exempt municipal property from taxation regardless of the use to which it is put.[233] Accordingly, once a court approves a financing program, there is no serious question of state law with respect to tax exemption, except in the case of revenue bond plans.[234]

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224 The Mississippi statute is an exception. Miss. Code Ann. § 8936-21 (1956) expressly exempts the public facility from taxation.

225 See Wayland v. Snapp, 232 Ark. 57, 71-73, 334 S.W.2d 633, 641-42 (1960); Village of Deming v. Hosdreg Co., 62 N.M. 18, 36-37, 303 P.2d 920, 932 (1956) (dissenting opinion); Gilmore, Developing the "Little" Economics 62 (1959).

226 Wayland v. Snapp, *supra* note 225, at 71-73, 334 S.W.2d at 641-42.

227 *E.g.*, Tenn. Code Ann. § 6-2913 (Supp. 1962) (Mississippi plan); Ala. Code tit. 37, § 511(30) (1958) (revenue bond plan).

228 Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 349, 353 P.2d 767, 775 (1960).

229 *E.g.*, Ark. Const. art. 16, § 5.

230 *E.g.*, Ind. Const. art. 10, § 1.

231 See 51 Am. Jur. *Taxation* §§ 557, 562, 569-76 (1944).

232 See Wayland v. Snapp, 232 Ark. 57, 78, 334 S.W.2d 633, 644 (1960) (dissenting opinion); City of Cleveland v. Carney, 172 Ohio St. 189, 174 N.E.2d 254 (1961); *In re* Township of Moon, 387 Pa. 144, 127 A.2d 361 (1956); Fordham, The State Legislative Institution 83-84 (1959).

233 *E.g.*, Idaho Const. art. 7, § 4.

234 If we apply the earlier characterization of the municipality's role under the revenue bond plan as that of a trustee under a mortgage deed of trust, a serious ques-

A number of cases have held that public income-producing property leased to a private lessee is not used for a public purpose for purposes of tax exemption.[235] However, this body of cases is of limited significance. Unlike the leases involved in those decisions, the principal goal of industrial financing programs is not to produce rental income. The receipt of rent is no more a vital objective of public industrial financing than it is when municipal airport property is leased to an air carrier. In addition, the cases referred to usually arose in a context of conflict among taxing units; the underlying problem presented was that of apportioning an economic burden among taxing units.[236] This problem of allocating economic burdens does not, however, generally loom as a significant difficulty in industrial financing.[237]

The economic benefits of tax exemption under the Mississippi and revenue bond plans are passed on directly to the lessee who generally has an assured occupancy for virtually the entire useful life of the facility. The crucial problem is whether exemption of the facility from taxation unreasonably discriminates among taxpayers. Virtually every state constitution contains a uniformity clause, which at the very least

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tion is presented as to whether the facility should be deemed public property for tax exemption purposes. The exemption of public property has generally not been applied in cases where the municipality is acting as a trustee for private persons. St. Louis v. Wenneker, 145 Mo. 230, 47 S.W. 105 (1898); City of Seattle v. King County, 3 Wash. 2d 26, 99 P.2d 621 (1940); *cf.* Calvin v. Custer County, 111 Mont. 162, 107 P.2d 134 (1940) (upholding an exemption on property to which the United States held equitable title under a contract of sale).

235 City of Cleveland v. Carney, 172 Ohio St. 189, 174 N.E.2d 254 (1961); *In re* Township of Moon, 387 Pa. 144, 127 A.2d 361 (1956); Public Parking Authority v. Board of Property Assessment, 377 Pa. 274, 105 A.2d 165 (1954); see 51 AM. JUR. *Taxation* §§ 573-76 (1944).

236 See Stimson, *The Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411, 426-28 (1934); note 237 *infra*.

237 The underlying problem typically presented in litigation challenging the tax exempt status of publicly owned property is one of allocation of economic burden among taxing units. See Stimson, *supra* note 236. If a county-owned airport is located in townships *A* and *B*, the effect of tax exemption is to compel *A* and *B* to participate in the operating costs of the airport. Even if the townships provide no services, considerable areas which would otherwise be taxable are withdrawn from the tax rolls. Residents of townships *A* and *B*, therefore, contribute to the airport in a dual capacity as township taxpayers and as county taxpayers; taxpayers in townships *C* and *D*, however, contribute only as county taxpayers. See, *e.g.*, *In re* Township of Moon, 387 Pa. 144, 127 A.2d 361 (1956).

This problem of allocation of burden among taxing units is generally not a problem of first magnitude in industrial financing. While it is difficult to anticipate all possible conflicts among taxing units, some are set forth here. The Mississippi and revenue bond plan statutes commonly grant authority to cities to construct a project outside the municipal limits. See, *e.g.*, TENN. CODE ANN. § 6-2903(1) (Supp. 1962). If a city should utilize these powers to construct a plant in the unincorporated area beyond its limits, the tax exemption would be borne by all county taxpayers equally. Since both the direct and indirect economic benefits will normally be felt over an entire county, county taxpayers can hardly complain about the allocation of burden. A less likely possibility is presented by the construction of a facility by the county government within the city limits. Here, city residents could justly complain of having to contribute both as city taxpayers and as county taxpayers for a county-initiated project.

forbids unreasonable classification of taxpayers.[238] In the few states which lack such a provision, an equal protection clause subsumes the same requirement.[239] In construing the public purpose exemption therefore, courts must harmonize it with the prohibition against unreasonable classification so as to accord vitality to both. This task will not necessarily be accomplished by equating the public purpose limitation on expenditures with the public purpose exemption. In a very real sense, the fundamental question concerns the validity of a subsidized pattern of industrial financing. Without the element of tax exemption, the Mississippi plan can be looked upon as only a minimal subsidy; and this is true a fortiori of revenue bond plans. The emphasis suggested here may seem inconsistent with the traditional approach which treats the problem of selection and exemption of objects of taxation independently of the question of appropriation of public funds.[240] On closer consideration, however, there is no conflict. Unlike the typical tax exemption problem, the Mississippi and revenue bond plans present the question in a special context—one in which public financing is bound up with tax exemption. Because of this, courts may well abandon the traditional approach for a more realistic one which considers the tax exemption issue as one element in a complex program.

The factors which support the use of public industrial financing do not necessarily apply to the question of the reasonableness of classification for purposes of tax exemption. Public financing is necessary because of the critical need to expand incomes and the paucity of private long-term investment in industrial expansion. However, there is no reason to believe that industrial lessees need the indirect subsidy of tax exemption any more than do manufacturers who construct new plant facilities with private financing. Quite to the contrary, the manufacturer who with great difficulty obtains private financing at high interest rates may have the greater need of tax relief. It is also possible that the economic benefits to the community derived from his activity may be greater than those realized from lessees of municipal facilities. A number of states grant tax exemption to all new manufacturing industries for a fixed term, or even an indefinite term,[241] with judicial ap-

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238 See NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 9-11 (1959).

239 See *id.* at 595-600.

240 See, *e.g.*, Williams v. Baldridge, 48 Idaho 618, 284 Pac. 203 (1930); Baker and Curry, *Taxpayer's Paradise in the Caribbean*, 1 VAND. L. REV. 194, 199-201 (1948); Stimson, *supra* note 236, at 419.

241 In some states, this is accomplished by constitutional amendment, and in others by statute alone. See Note, *Legal Limitations on Public Inducements to Industrial Location*, 59 COLUM. L. REV. 618, 626 n.66 (1959), where the pertinent constitutional and statutory provisions are set forth.

proval.[242] The validity of the classification in public industrial financing, however, is considerably weaker. It rests precariously on the fact of legal title in the municipality, the only differential between the exempt class of manufacturing enterprises and all others.

The public purpose limitation on public spending and the public purpose exemption should not be equated but rather, in approving tax exemption under the public purpose exemption, courts should require a higher degree of public control over the project than is exacted under the public purpose limitation on public expenditures. A decree holding the tax exemption invalid for failure to satisfy the entreprise aid criteria would not be unwarranted. As a minimum, compliance with the modified enterprise aid standard should at least be required for tax exemption, with the proviso that the approving officials be required to certify that both the public financing and the exemption are necessary and in harmony with the area economic development plan.

Where state tax exemption for the facility is expressly incorporated into the industrial financing statute, as in Mississippi, there is the additional consideration of deference due to the legislative judgment. However, in this instance the position advanced with respect to the problem of classification should prevail over the presumption of constitutionality; unless the safeguards of the modified enterprise aid standard are met, tax exemption should be held invalid under the uniformity clause, as an unreasonable classification.[243]

A similar conclusion is merited with respect to the validity of the statutory exemption commonly granted owners of industrial revenue bonds from state personal property and income taxes. The economic benefits of these exemptions are also passed on to the lessee. Accepting the characterization of the municipality as analogous to a trustee under a mortgage deed of trust, the exemption of these bonds seems equally unreasonable unless the requirements of the modified enterprise aid standard are met.

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242 See, *e.g.*, Crafts v. Ray, 22 R.I. 179, 46 Atl. 1043 (1900); 2 COOLEY, TAXATION §§ 757-58 (4th ed. 1924); *cf.* Allied Stores v. Bowers, 358 U.S. 522, 528 (1959) (dictum).

243 The equal protection clause of the fourteenth amendment also operates as a limitation on state tax exemptions by requiring reasonable classification. However, the inhibitions implicit in a federal system make for greater judicial restraint in the application of federal constitutional limitations by federal courts, so that classifications deemed unreasonable by many state courts might be sustained at the federal level. A comprehensive analysis in 1938 of the application of the equal protection clause in the area of state tax legislation concluded that the Supreme Court has permitted state legislatures great discretion in classifying for tax purposes. Sholley, *Equal Protection in Tax Legislation* (pts. 1-2), 24 VA. L. REV. 229, 388, 414-16 (1938). A 1959 study substantially confirms this conclusion. NEWHOUSE, *op. cit. supra* note 238, at 601-08. It would seem highly unlikely, therefore, that the Supreme Court would characterize as wholly arbitrary the exemption of a publicly owned industrial facility either as public property or as public property used for public purposes—regardless of the lack of public control reserved over the facility.

Statutory tax exemption of general obligation bonds, however, can be justified without imposing additional requirements. These bonds pledge the credit of the municipality. Since they flow freely in commerce, there may well be no easy means of ascertaining the purpose for which the proceeds were expended. It is true that the economic benefits of the exemption flow directly to the lessee in the form of reduced rent, but the exemption is several steps removed from the lessee as it is an exemption on the property and income of third parties, the bondholders. In considering the problem of exemption of the facility however, the very object of the tax levy is a structure in which the lessee has an interest approximating full ownership.

VIII. Conclusion

Public industrial financing is a logical culmination of the city and state planning movement which began in the early years of this century. Public planning guided private development, but it rarely actively stimulated it. By the end of World War II, the emphasis had shifted from planning to planning joined with development.[244] Negative attitudes toward expanding government were overcome by a resurgence of the American drive for growth and progress. The primary economic energy for this drive has come from the industrially underdeveloped southern and border states which are in the midst of their regional take-off. Significant secondary support has come from the mature economies of the Middle Atlantic and New England states that have decided to come to grips with the many adverse long run regional trends.

The increasing recognition that the states and municipalities must assume a more affirmative role in promoting local and regional development is also reflected in the current programs of public subsidization of commuter rail transportation in metropolitan areas.[245]

The growing acceptance of the necessity for public industrial financing has stimulated a state constitutional counter-revolution directed at sharply modifying the public aid limitations and the public purpose doctrine, our legacies from the nineteenth-century constitutional revolution. The current movement has taken two forms—outright modification by constitutional amendment and erosive modification by combined legislative and judicial action. Public industrial financing programs based upon an enabling constitutional amendment

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244 See Gilmore, *op. cit. supra* note 225, at 13-14, 28-31.

245 See, *e.g.*, Opinion of the Justices, 337 Mass. 800, 152 N.E.2d 90 (1958); N.J. Stat. Ann. §§ 48:12A-1 to -16 (Supp. 1961); 1958 Ops. Philadelphia City Solicitor 42.

present no substantial question of state constitutional law. This study has accordingly focused upon the constitutional problems arising under programs which rest solely upon statute.

The principal conclusions can be summarized as follows:

1. *The Tax Supported Plans.* Approval of these plans requires a significant departure from settled judicial construction of both the public aid limitations and the public purpose test over a period of many decades. In passing upon programs involving public investment in transportation, recreation and parking facilities, leased for long terms to private parties, courts have placed major emphasis on the degree of public control asserted—control to insure realization of the public purposes underlying the program and control in the interest of safeguarding the public investment. However, where the urgency of achieving the economic objectives so dictated, courts have relaxed the weight accorded the public control factor. This relaxation has been particularly apparent in the case of public investment in port facilities which are leased to private carriers. Judicial approval of tax supported public industrial financing requires an even further dilution of the public control requirement.

The need for careful differentiation between the public aid limitations and the public purpose test has been emphasized. The former come to us with a specificity rooted in the nineteenth-century reaction to the evils of the railroad bond era. To permit a further relaxation of the public control requirement would do violence to the language of the public aid limitations and to their spirit. Tax supported plans should, therefore, be deemed invalid in states where a pertinent public aid limitation has been adopted.

The public purpose doctrine, however, is basically a due process limitation and is capable of greater elasticity. It is urged herein that the public purpose test evolve in the direction of greater judicial restraint. Two alternative standards are recommended: the rational basis standard, which would permit judicial approval of the tax supported plans in their present form; and the modified enterprise aid standard, which would permit approval of these plans after the adoption of feasible legislative changes.

The public aid limitations are becoming obsolete in twentieth-century America. Outright repeal rather than *ad hoc* modification is probably the healthiest remedy. If some judicially enforceable constitutional limitation on the purpose of public expenditures is deemed necessary, this can best be accomplished by the use of the public purpose doctrine, a limitation which can be made responsive to the forces of change in a dynamic society.

2. *The Revenue Bond Plan.* While projects under this plan are not tax supported, municipal activity under these statutes could lead to tort liability or impaired credit status. These risks, however, must be regarded as minimal. Due deference to the legislative judgment dictates a strict application of both the public aid limitations and the public purpose test so as to permit economic experimentation.

3. *Tax Exemption.* Whether a tax exempt status for the facilities and the bonds can be upheld should be considered as questions independent from that of the validity of the financing. Tax exemption of the facility must be regarded realistically as a subsidy—a gratuitous rendering of municipal services to selected manufacturers. In deciding whether this classification scheme can be justified under the uniformity clause of state constitutions, courts may appropriately require a higher degree of public control over the tax exempt facility than is here recommended under the public purpose test.

APPENDIX

THE EXTENT OF PUBLIC INDUSTRIAL FINANCING[1]

State	Number of Projects	Total Public Funds Invested (Dollars)	Total Project Cost (Dollars)[2]	Date of Enactment of Statute or Constitutional Amendment
1. Mississippi Plan				
Alabama[3]	9		3,210,000	1950
Arkansas	34		9,931,250	1958
Louisiana[4]	16		3,430,000	1952
Mississippi[5]	320		110,343,000	1936
Tennessee	44		13,492,000	1955
2. Revenue Bond Plan				
Alabama[6]	24		39,935,000	1949, 1951
Arkansas	25		32,483,000	1960
Georgia	no information		approx. 4 to 5 million	1957
Kentucky	29		30,570,000	1946
Mississippi	2		370,000	1960
New Mexico	4		9,113,000	1955
North Dakota[7]	2		3,500,000	1955
Tennessee	105		49,733,000	1951
3. Pennsylvania Plan				
Arkansas[8]	7	601,000	no information	1955, 1960
Kansas[9]	no information	124,005	no information	1923
Kentucky	3	517,000	3,074,390	1958
Pennsylvania[10]	157	19,507,174	61,438,094	1956
4. New England Plan				
Maine	16	5,103,431	5,993,000	1958
Rhode Island	15	12,547,000	14,000,000	1958
5. Oklahoma Plan				
Maryland	1	17,500	no information	1960
New Hampshire	11	3,202,000	3,202,000	1955
Oklahoma	3	569,989	2,557,160	1960

[1] Unless otherwise indicated, all information is based upon letters and reports of the appropriate state agencies.

[2] In the case of the Mississippi and revenue bond plans, unless otherwise stated, the cost of the project equals the total funds raised by the municipalities.

[3] Complete information on Alabama is not available. In addition to the projects listed above under the Mississippi and revenue bond plans, the Alabama Planning and Industrial Development Board lists twenty-six other projects in the amount of $5,214,000; the agency is uncertain as to whether these have been financed by general obligation or revenue bonds. However, since municipalities in only five counties have been authorized to issue general obligation bonds for industrial financing, it is likely that the bulk of these projects were financed by revenue bonds.

[4] Investment Bankers Ass'n of America, Municipal Industrial Financing (1961). 1961 projects are not included.

[5] For the ten-year period, 1952 through 1961, the statistics for Mississippi are as follows: 242 projects; project cost of $93,707,000.

[6] See note 3 *supra*.

[7] While the cost of the project generally equals the amount of revenue bonds issued, this is not true in North Dakota, where the industrial firm had advanced a portion of the capital. The total amount of revenue bonds issued is $2,555,000.

[8] This includes current state funds used to finance four purchases of issues of second lien obligations of non-profit development corporations in the amount of $151,000 pursuant to Ark. Stat. Ann. § 9-532 (Supp. 1961), and three purchases of issues of municipal revenue bonds under the authority of Ark. Stat. Ann. § 13-1207 (Supp. 1961).

[9] Hite, The Industrial Levy in Kansas 11, 30 (Kansas Univ. Bureau of Business Research 1954). The statistics are for the period 1939-1953.

[10] This includes $165,000 of authority loans (four projects) which have been retired.

TABLE I

State	Case	*Per capita income as percentage of continental U.S.*[a]	*Number of months in 24 month period prior to decision in which unemployment rate is higher than national average*[b]
	Legislation upheld		
Ala.	Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952).	62	20
Ark.	Andres v. First Arkansas Dev. Fin. Corp., 230 Ark. 594, 324 S.W.2d 97 (1959).	61	24
Kan.	Kansas *ex rel.* Ferguson v. City of Pittsburg, 188 Kan. 612, 364 P.2d 71 (1961).	92	2
Ky.	Dyche v. City of London, 288 S.W.2d 648 (Ky. 1956).	68	24
Md.	City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957).	106	0
Miss.	Albritton v. City of Winona, 181 Miss. 75, 178 So. 799 (1938).	36	[c]
N.M.	Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956).	77	0
Tenn.	McConnell v. City of Lebanon, 203 Tenn. 498, 314 S.W.2d 12 (1958).	70	24
	Legislation held invalid		
Del.	McClelland v. Mayor of Wilmington, 159 A.2d 596 (Del. Ch. 1960).	136	2
Fla.	State v. Town of No. Miami, 59 So. 2d 779 (Fla. 1952).	80	9
Idaho	Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960).	82	9
Neb.	State *ex rel.* Beck v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957).	90	3
Wash.	Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959).	105	17

[a] The figures on per capita income as a percentage of the continental United States are generally for the year of the state court decision. However, in the case of Delaware, Idaho, and Kansas, the statistics for the year 1959 are used because later years are unavailable. Where more than one industrial financing decision has been before any court, the case which appears to be the most crucial has been selected for this table. Unless otherwise indicated, all the information on per capita income is from the *United States Statistical Abstract*, as follows:

Ala. 1954, at 306.
Ark. 1961, at 310.
Del. 1961, at 310.
Fla. 1954, at 306.
Idaho 1961, at 310.
Kan. 1961, at 310.
Ky. 1958, at 314.
Md. 1959, at 314.
Miss. Survey of Current Business, August, 1949, at 15.
Neb. 1959, at 314.
N.M. 1958, at 314.
Tenn. 1960, at 313.
Wash. 1961, at 310.

[b] This column sets forth the number of months in the 24 month period immediately preceding the state court decision in which the ratio of state insured unemployment to average covered employment is higher than the similar ratio for the entire continental United States. All information is from the pertinent monthly issues of *U.S. Dep't of Labor, The Market and Employment Security.*

[c] There are no reliable statistics available. In view of general information about the critical state of the Mississippi economy during this period, however, it is reasonable to infer that the rate of unemployment was higher than the national average. See generally WALLACE, INDUSTRIALIZING MISSISSIPPI 2-3, 13-17 (Univ. of Miss. Bureau of Public Administration 1952).